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No. 77-436

# In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

*v.*

MCI TELECOMMUNICATIONS CORP., ET AL., RESPONDENTS

***PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT***

**DANIEL M. ARMSTRONG,**
*Associate General Counsel,*
**JOHN E. INGLE,**
*Counsel.*
*Federal Communications Commission,*
*Washington, D.C. 20554*
*(202) 632-7112.*

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*PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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The Federal Communications Commission respectfully asks this Court to issue a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. A) [1] is not yet reported. The decision of the Federal Communications Commission (App. B) is reported at 60 FCC 2d 25.

## JURISDICTION

The court of appeals entered judgment on July 28, 1977. That court stayed its mandate by order dated August 22, 1977 (App. C), and this petition for certiorari is filed within the time allowed by the stay of mandate order. Rule 41(b) of the Federal Rules of Appellate Procedure. This Court has jurisdiction by virtue of 28 U.S.C. § 1254(1).

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[1] The appendices are under separate cover.

## QUESTION PRESENTED

The court of appeals held in this case that the Commission had erred in ordering MCI Telecommunications Corp., a specialized communications common carrier, to cease and desist from offering a service called "Execunet" which the Commission had found to be essentially identical to ordinary long distance telephone service.[2] The Commission had based its order on its finding that Execunet was not a private line service within the scope of MCI's limited authorization, but that in all essential respects it was the same as ordinary long distance telephone service which MCI had no authority to provide. The court of appeals reversed on its own finding that the Commission had never made the requisite public interest findings that would justify service limitations on MCI's authorizations. Accordingly, the court of appeals held that MCI was free to provide Execunet and any other services for which its facilities are adequate, and that its authorizations were not limited in any way, despite the fact that the Commission had not considered whether unlimited authorization would serve the public convenience and necessity within the meaning of 47 U.S.C. § 214.

The question for the court is:

Whether the court of appeals erred in holding that specialized common carriers such as MCI have authority to provide ordinary long distance telephone service, despite the fact that the FCC, with express approval of the Ninth and Third Circuits, had consistently regarded its specialized common carrier policy as limited to private line services and had not made the requisite statutory finding that competition in ordinary long distance service would serve the public convenience and necessity.

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[2] A subscriber to Execunet can call from any telephone in the city of origin to any telephone in any other city in the MCI network, using MCI's intercity circuits in connection with local exchanges belonging to the telephone companies. Subscribers are billed for each call on the basis of time and distance, subject to a monthly minimum. (App. A, p. 4a & n.3; App. B, p. 33a n.1.)

## STATUTES INVOLVED

Sections 1, 4, 204, 205, 208, 214, 303, 308 and 309 of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151–609, are set forth in relevant part in App. D.

## STATEMENT

Section 214 of the Communications Act empowers the FCC to authorize construction and operation of interstate communications facilities and thus to control entry into communications markets.[3] The statute presupposes that unlimited entry will not always and necessarily serve the public interest. The FCC must consider in discrete instances or in general policymaking whether new competitive entry will further the statutory public interest goal of efficient service with adequate facilities at reasonable charges. 47 U.S.C. §§ 151, 214(a).[4] When faced with an application, the FCC may issue the certificate "as applied for," or deny it, or issue it in part or subject to "such terms and conditions as in its judgment the public convenience and necessity may require." 47 U.S.C. § 214(c). The Commission may not grant the authorization at all, however, unless it can certify that the "public convenience and necessity" require construction and operation of the proposed facility. 47 U.S.C. § 214(a).

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[3] Section 214 was patterned after Section 1(18–22) of the Act to Regulate Commerce as amended by the Transportation Act of 1920, 41 Stat. 456 (recodified as 49 U.S.C. § 1(18)). See S. Report No. 781, 73d Cong., 2d Sess. 5 (1934); H.R. Report No. 1850, 73d Cong., 2d Sess. 6 (1934). The purpose of those provisions is "to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest." *Texas & N.O.R. Co.* v. *Northside Belt Ry. Co.*, 276 U.S. 475, 479 (1928). Similar certification statutes appear in other regulatory acts. *E.g.*, 49 U.S.C. § 307 (motor carriers); 49 U.S.C. 1371 (air carriers)

[4] See *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953); *Washington Utilities & Transp. Comm.* v. *FCC*, 513 F. 2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975); *Hawaiian Telephone Co.* v. *FCC*, 498 F. 2d 771 (D.C. Cir. 1974).

Once a carrier has obtained certification, it may offer service consistent with its certificate by filing tariff schedules, which describe the regulations, practices and charges governing the service. 47 U.S.C. § 203. A tariff filing may not broaden the scope of certification, however, and the FCC may reject any tariff which purports to offer services that are beyond the authority of a limited service carrier.[5]

The court of appeals in this case held that the FCC had incorrectly construed Section 214 as empowering it to limit certificates to the services proposed by the carrier in its application. According to the court of appeals, the FCC may grant a limited authorization only if it has looked beyond the applicant's proposed services and made an "affirmative determination of public interest need for restrictions." (App. A, pp. 24a–29a.) Because the FCC, in adopting its specialized common carrier policy[6] and in granting specific applications pursuant to that policy, had not made such an "affirmative determination," the court of appeals found that the FCC had not limited the specialized carriers' certificates. With unlimited authorizations, the court said that MCI was free to offer any service its facilities could provide merely by filing tariffs. Accordingly, the court reversed the FCC's decision to require MCI, a specialized carrier, to stop offering Execunet and to remain within what the agency had regarded as the carrier's sphere of authorized services.

The court's decision in effect removes service limitations on the specialized carriers—even though the FCC never has weighed the public interest benefits and detriments of competition outside the area of private line services and has not

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[5] See, *e.g.*, *Press Wireless, Inc.*, 25 FCC 1466 (1958), *aff'd sub nom. Press Wireless, Inc.* v. *FCC*, 264 F. 2d 372 (D.C. Cir. 1959), *Cf. ITT World Comm., Inc.* v. *FCC*, 555 F. 2d 1125 (2d Cir. 1977) (recognizing the need for further authorization under Section 214 to remove restrictions on AT&T's use of international cable and satellite facilities); *Flying Tiger Line* v. *C.A.B.*, 204 F. 2d 404 (D.C. Cir. 1953); *W. J. Dillner Transfer Co.* v. *United States*, 214 F. Supp. 941 (W. D. Penn. 1963).

[6] *Specialized Common Carrier Services* (Docket No. 18920), 29 FCC 2d 870, 31 FCC 2d 1106 (1971), *aff'd sub nom. Washington Util. & Transp. Comm.* v. *FCC*, 513 F. 2d 1142.

warranted that unlimited competition will serve the public interest. The decision leaves in doubt the scope of authority under certificates and licenses granted to domestic satellite carriers,[7] "value added" carriers,[8] and a number of categories of miscellaneous carriers with similarly limited grants.[9] The decision also imposes on the Commission a new interpretation of the certification process under Section 214 which will require scrutiny of applications beyond the proposed services and which may bring into question the validity of numerous grants made under the agency's own interpretation of that statute.

### A. THE INDUSTRY STRUCTURE AND SPECIALIZED COMMON CARRIERS

Communications carriers render telephone service that may be divided, for purposes of this case, into two broad categories: (1) message telecommunications service (MTS), which includes ordinary long distance toll service and wide area telecommunications service (WATS); and (2) private line service, also known as leased line service.[10] Long distance public toll service traditionally has been a *de facto* monopoly offering, just as local exchange telephone service normally is provided by a single local carrier. The interstate public MTS network, comprising the interconnected local exchanges of American Telephone & Telegraph Company operating companies and some 1,600 independent telephone companies, historically has been

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[7] *Domestic Communication-Satellite Facilities*, 35 FCC 2d 844, 38 FCC 2d 665 (1972).

[8] *E.g.*, *Packet Communications, Inc.*, 43 FCC 2d 922 (1973); *Graphnet Systems, Inc.*, 44 FCC 2d 800 (1974); *Telenet Communications, Inc.*, 46 FCC 2d 680 (1974). See also *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261 (1976), 62 FCC 2d 588 (1977), *review pending sub nom. American Tel. & Tel. Co.* v. *FCC*, No. 77–4057, Second Circuit.

[9] *E.g.*, 47 C.F.R. 21.500–523 (domestic public land mobile radio service); 47 C.F.R. 21.800–809 (local television transmission service); 47 C.F.R. 21.900–908 (multipoint distribution service).

[10] See, *e.g.*, M. Irwin, *The Telecommunications Industry* 24–25 (1971).

the sole source of long distance public voice telephone service.[11]

Private line service, by contrast, has been subject to some degree of competition for many years.[12] Private line service is just what the name implies: a service in which the customer buys the privilege of using facilities that are dedicated in some meaningful respect to his personal use, always available to him, directly connecting the customer's premises with another point (or a number of other points) selected in advance, capable of instant connection without the need for dialing, and tariffed at a flat periodic rate rather than according to use.[13] Private line service attracts customers, primarily business or governmental organizations, which have a substantial need for communications between or among limited numbers of fixed locations.

In recent years, the Commission has found that the demand for more and different private line services exceeds the capacity and innovative efforts of the existing carriers to satisfy it. The gap between demand and supply does not necessarily reflect indifference or incompetence on the part of the carriers. Rather, the telephone companies have spent their energies and resources keeping up with the burgeoning demand for ordinary public services, and simply have not remained abreast of the more specialized demand for data and other nonvoice services

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[11] AT&T furnishes virtually all the intercity lines and circuits connecting the local exchanges into a single interstate MTS network.

[12] See *Wilson & Co.* v. *FCC*, 335 F. 2d 788 (7th Cir. 1964), *remanded for consent settlement*, 382 U.S. 454 (1966), which recognized the long standing competition between AT&T and the Western Union Telegraph Company in some private line services. More recently, the District of Columbia and Second Circuits have noticed the distinction between AT&T's "competitive" private line services and its "monopoly" MTS services. *Nader* v. *FCC*, 520 F. 2d 182, 187 (D.C. Cir. 1975); *American Tel. & Tel. Co.* v. *FCC*, 487 F. 2d 864, 868 (2d Cir. 1973).

[13] App. B, pp. 61a–64a. See also *Private Line Cases*, 34 FCC 244, 249–50 (1961) (Initial Decision), *aff'd*, 34 FCC 217 (1963), *aff'd sub nom. Wilson & Co.* v. *FCC*, 335 F. 2d 788, 792. Private line services need not have all these characteristics, and some of them do not. See *Bell Telephone Co. of Penn.* v. *FCC*, 503 F. 2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).

and for customized private voice services.[14] Competition has been authorized in private voice as well as data communications, in the expectation that new entrants would satisfy the unmet demand and provide innovation in technology and marketing.

The Commission granted its first specialized carrier authorization to MCI in 1969 after six years of proceedings, authorizing MCI to provide private line services between Chicago and St. Louis.[15] Hundreds of similar applications from MCI and other prospective specialized carriers followed the MCI grant. Rather than refer each application to a separate hearing, at

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[14] The Commission first perceived the need for new companies capable of providing flexible, tailored private line services during its Computer Inquiry, which began in 1966. *Customer Interconnection*, 61 FCC 2d 766, 781–82 (1976). The Computer Inquiry resulted in rules governing the participation of common carriers in data processing activities. *Computer Inquiry*, 28 FCC 2d 291 (1970), *aff'd in part sub nom. GTE Service Corp.* v. *FCC*, 474 F. 2d 724 (2d Cir. 1973). It had recognized the need for more private communications service several years earlier, however, when it made radio frequencies available for private microwave systems for companies and other organizations with sufficient need for point-to-point service to justify building their own communications systems. *Allocation of Frequencies in the Bands above 890 Mc.*, 27 FCC 359 (1959), 29 FCC 825 (1960). These frequencies may not be used for common carriage, but they provide indirect competition to established private line services.

[15] *Microwave Communications, Inc.*, 18 FCC 2d 953 (1969), 21 FCC 2d 190 (1970). The FCC's hearing designation order on the MCI applications focused on the services MCI proposed, directing the inquiry to such issues as the nature and extent of the facilities and services, the communities and entities which would be expected to receive the services, the public need for the services, and the benefits and detriments expected from authorizing the facilities and services. *Microwave Communications, Inc.*, 31 Fed. Reg. 2666, 2668 (1966). After considering these issues, the Commission made what it regarded as a limited grant of authority to MCI for the Chicago-St. Louis route, authorizing only the services MCI had proposed. The hearing examiner focused on the limited service in his initial decision:

"MCI does not propose a message toll or exchange telephone service, but it will offer its channels to subscribers for interoffice communications. Subscribers would not be supposed to communicate with each other over MCI's facilities."

18 FCC 2d at 982.

significant cost in time and resources, the Commission initiated a rulemaking proceeding to resolve the general policy question that was common to all the applications: whether the public interest would be served by a general policy of open entry into the specialized communications field. *Specialized Common Carrier Services* (Docket No. 18920), 24 FCC 2d 318 (1970).

In its notice of inquiry and proposed rulemaking, the Commission noted that the applicants proposed only "specialized private line services," 24 FCC 2d at 324, and limited its public interest inquiry to that segment of the communications market, *id.* at 335–38. The FCC disclaimed any intention, in its notice, of authorizing direct competition to MTS and WATS, pointing out that "none of the applicants proposes to provide this type of service, and we see no reason to expect any undesirable effects upon these services." *Id.* at 335.

After extensive proceedings, the Commission concluded that there was a need for the proposed services, that new entry into this limited market would produce specific public benefits and would have little adverse impact on the established carriers, and that a general policy of open entry into the interstate private line market would serve the public interest, convenience and necessity. The FCC specifically rejected claims by the established carriers that new entry would have an adverse impact on their revenues and therefore on their service to the public. The agency found that the impact would be minimal because of the limited scope of the proposed services. The FCC relied upon the fact that the great bulk of the established carriers' revenues came from long distance service and WATS, which the applicants did not propose to offer. *Specialized Common Carrier Services*, 29 FCC 2d 870, 31 FCC 2d 1106 (1971).

The Ninth Circuit unanimously affirmed. *Washington Util. & Transp. Comm.* v. *FCC*, 513 F. 2d 1142. That court interpreted the Commission's policy broadly as approving entry into the entire field of private line services, but not public telephone services:

> The business involved is that of providing specialized private or leased line communications services through

> microwave transmission facilities, as distinguished from public exchange and long distance toll telephone service.

513 F. 2d at 1155. The Ninth Circuit also found rulemaking to be a lawful and appropriate means of setting policies to govern individual applications. 513 F. 2d at 1160–65. In particular, that court said:

> Though the Commission said it would pass separately upon the merits of each pending application, presumably the rule would govern individual cases. That is its function.

*Id.* at 1164.

The Commission has consistently regarded the policy as authorizing competition in the full range of private line services, but not in public services such as long distance toll calling. It has rejected repeated efforts by the established carriers to *constrict* the policy. See, *e.g. United States Transmission Systems, Inc.*, 48 FCC 2d 859 (1974), *aff'd sub nom. American Tel. & Tel. Co.* v. *FCC*, 539 F. 2d 767 (D.C. Cir. 1976); [16] *Bell System Tariff Offerings*, 46 FCC 2d 413 (1974), *aff'd sub nom. Bell Tel. Co. of Penn.* v. *FCC*, 503 F. 2d 1250; [17] *Specialized Common Carriers*, 44 FCC 2d 467 (1973), 50 FCC 2d 416 (1974) (reaffirming the policy in the face of an AT&T petition for a moratorium on further grants pending a review by the FCC of the effects of competition). But it has never *expanded* the policy to authorize competition in public long distance telephone service, nor has it been asked to do so.

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[16] The D.C. Circuit stated in the *AT&T* case:

"The Commission decided broadly that the public interest, convenience, and necessity would be served by permitting specialized common carriers to provide a full range of private line communications services in direct competition with the established carriers * * *."

539 F. 2d at 773–74.

[17] The Third Circuit held in *Bell Tel. Co. of Penn.* that "the Commission intended to authorize the new carriers to provide all elements of private line services * * *."

### B. THE EXECUNET MATTER

After several years of offering private line services in accordance with its authorizations, MCI on September 11, 1974, filed tariff revisions to broaden its service offerings by providing "metered use service" as an additional option to its full-time and part-time private line services. The tariff did not mention Execunet by name and did not describe the service. Members of the FCC staff met several times with MCI personnel to discuss the meaning of the revisions and to seek clarification of what was being offered. The tariff became effective by operation of law on October 10, 1974,[18] even though FCC staff members still were seeking clarification of the tariff and the services it purported to describe. (App. B, pp. 38a–39a.)

MCI began to sell Execunet in January 1975. (App. B, p. 39a.)[19] Several months later, AT&T became aware of the nature of the service and brought the matter to the Commission's attention, first orally[20] and then in a written complaint. After two rounds of investigation[21] and after oral argument that was open to all interested parties including other specialized car-

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[18] 47 U.S.C. §§ 203(b), 204.

[19] Although it described Execunet as a new private line network, MCI stated in promotional material that users could save substantially on "long distance telephone service" and "intercity telephone calls." Supplemental Appendix 189–93, filed in court of appeals. In one brochure, MCI stated:

"MCI is the first company offering intercity telephone service in competition with the telephone company."

Supp. App. 365, See also *id.* at 216–20.

[20] MCI made an issue of the oral complaint at the Commission and in the court of appeals. That issue is not in the case at this point, however, for it was not a factor in the court of appeals decision.

[21] The FCC first decided the matter adversely to MCI in a letter order released July 2, 1975, after receiving three letters setting forth MCI's views. (App. B, pp. 99a–104a.) In that order, the FCC rejected MCI's tariff insofar as it offered Execunet, on grounds that Execunet was an unauthorized service. MCI sought review of the letter order, and, in an application for judicial stay, made arguments that the FCC had not had an opportunity to address in its letter order. On motion of the FCC, the court of appeals held the review proceeding in abeyance to allow the FCC to conduct further proceedings in which it would consider MCI's arguments. (App. A, p. 8a.)

riers, the FCC issued its final decision on July 13, 1976, finding that Execunet was outside MCI's limited authority and requiring the carrier to cease and desist from offering it. (App. B, pp. 89a–90a.)

Analyzing its own specialized common carrier policy, the Commission restated its consistent position that it had authorized competition "only in the limited portion of AT&T's and Western Union's business represented by private line services." (App. B, p. 51a.) Execunet, the Commission found on the basis of undisputed descriptions of the service, "has all the essential characteristics of MTS or WATS" and "does not have the essential characteristics of private line service * * *." (App. B, p. 64a.)[22] Accordingly, since Execunet was a service that MCI had no authority to provide, the FCC directed it to cease offering the service.

### C. THE DECISION BELOW

The court of appeals reversed. While it agreed that the FCC has authority to limit or condition certificates and licenses (App. A, pp. 23a–24a), it found that the FCC had not done so either in its *Specialized Common Carrier Services* proceeding or in subsequent grants of specific certificates to MCI.[23] The court conceded that the FCC "perhaps did not intend to open

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[22] For a brief description of Execunet, see note 2, *supra*, and appendix material cited there. For a schematic diagram of Execunet as compared with ordinary long distance service, see Supplemental Appendix 1027–28, filed in court of appeals.

[23] While many of MCI's certificates and licenses contain express statements to the effect that they are limited to authorized private line services and include by specific reference the limitations of the *Specialized Common Carrier Services* decision, not all of them do. (App. B, p. 49a.) All of the grants, however, depend upon the *Specialized Common Carrier Services* proceeding for validity, because the FCC has not made independent findings with respect to such grants that the public convenience and necessity required certification. 47 U.S.C. § 214(a). The FCC relies upon the *Specialized Common Carrier Services* decision as the source of the rule limiting MCI and other specialized carriers to private line services. The policy adopted in that proceeding governs individual grants. "That is its function." *Washington Util. & Transp. Comm.* v. *FCC*, 513 F. 2d at 1164.

the field of common carrier communications generally" (App. A, p. 28a)[24] and thus might have regarded the specialized carriers as limited to private line services. But it held that the Commission "cannot impose any such restriction unless it has affirmatively determined that 'the public convenience and necessity [so] require.' " (App. A, p. 24a.)

The court rejected the FCC's interpretation of Section 214 (a), which assumes that the agency may consider applications on the basis of the services proposed, limit its analysis to the public interest in receiving those services from the applicant, and grant authority in appropriate situations that goes no further than the services proposed and considered. Instead, the court of appeals would require the agency to make an additional public interest finding—after it has found justification for granting the certificate—that the applicant may not offer other unknown and unknowable services. The court thus would not allow the agency merely to consider the application before it, but would require analysis of matters of conjecture, lest the agency inadvertently introduce competition in areas it "did not perhaps intended to open * * *." (App. A, p. 28a)[25]

On motion by the FCC and by intervenors AT&T and the United States Independent Telephone Ass'n, the court of appeals stayed its mandate until September 19, 1977. (App. C.) MCI continues to provide Execunet to its existing customers pursuant to a stay entered by the court of appeals. (App. A, p. 8a n. 18.)

## REASONS FOR GRANTING THE WRIT

The Court should grant the petition for writ of certiorari because (1) the decision below conflicts directly with decisions of the Ninth and Third Circuits construing the scope of authorized competition by specialized common carriers, and conflicts in principle with decisions of this and other courts construing Section 214 and other certification statutes; (2) the decision and the principle it establishes are important be-

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[24] See also App. A, p. 26a.

[25] The court of appeals did not decide that Execunet was in fact a private line service. (App. A, p. 26a.)

cause of the fundamental changes and disruption they may cause in the communications industry and the significant impact they will have on the FCC's common carrier certification process; and (3) the decision is wrong as a matter of statutory construction, in that it ignores the plain language of Section 214(a) and the FCC's consistent application of that statute over the years.

### A. CONFLICT WITH OTHER DECISIONS

The decision below is irreconcilable with decisions of the Ninth and Third Circuits directly construing the FCC policy of limited specialized common carrier competition. The Ninth Circuit, in *Washington Util. & Transp. Comm.* v. *FCC*, 513 F. 2d 1142, affirmed the *Specialized Common Carrier Services* decision on direct review. A necessary premise of that court's decision was its finding that the FCC had authorized competition only in private line services:

> The business involved is that of providing specialized private or leased line communication services through microwave transmission facilities, as distinguished from public exchange and long distance toll telephone service.

513 F. 2d at 1155. This was no mere "general description of the services proposed," as the court of appeals in this case suggests. (App. A, p. 25a n. 59.) Rather, this finding was an essential premise for the analysis the Ninth Circuit performed in affirming the policy.

That court found that the FCC had lawfully authorized competition, under the standard articulated in *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953), because the FCC had found and warranted that specific public interest benefits would result from "entry of new carriers in the *specialized communications field* * * *." 513 F. 2d at 1159 (emphasis added).[26] Since the FCC had not warranted

[26] See also 513 F. 2d at 1156, 1158–60, 1165. The Ninth Circuit summarized, in affirming the adoption of policy in rulemaking:

benefits from competition outside the area of private line services, the Ninth Circuit might have been unable to affirm a broader policy on the record of that proceeding. See *Federal Comm. Comm.* v. *RCA Communications, Inc.*, 346 U.S. at 92–97. Further, that court found that the FCC had adequately appraised the adverse effects of competition on the established carriers, citing to the agency's analysis of the very small part of the total market that would be vulnerable to private line competition. 513 F. 2d at 1159, citing to 29 FCC 2d at 910–14.[27] At the urging of the Department of Justice and other parties supporting limited service competition, the FCC had rejected claims by the established carriers that new entry would require higher rates for public services such as MTS. The court found that the FCC had properly considered only that part of the established carriers' revenues that would be jeopardized by the services proposed in the specialized carriers' applications. If the effect of the FCC's policy had been to authorize unlimited competition, its analysis of impact on the established carriers' revenues and thus on rates for MTS might not have been sufficient to satisfy the Ninth Circuit under the *RCA Communications* test. 513 F. 2d at 1151. Plainly, the findings that specialized carriers were limited to private line services was essential to the Ninth Circuit's holding, and the D.C. Circuit's finding to the contrary in the Execunet case is in direct conflict.

In *Bell Tel. Co. of Penn.* v. *FCC*, 503 F. 2d 1250, the Third Circuit directly considered the scope of MCI's authorizations and, like the Ninth Circuit, concluded that the FCC had certified the specialized carriers to compete in the "full field of private line services." 503 F. 2d at 1270.[28] The ultimate question for that court was whether MCI was entitled to interconnection with AT&T for the provision of certain services which MCI

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"[T]he Commission * * * may determine that competition in the furnishing of a *class of regulated service* will lead not to poorer but to better service * * *. We have sustained the Commission's determination to this effect *with respect to the specialized communications field* as a whole.

513 F. 2d at 1166 (emphasis added).

[27] See also 513 F. 2d at 1156 n. 21.

[28] See also, *e.g.*, 503 F. 2d at 1259–62, 1269, 1273.

contended were private line services and AT&T claimed were not. In the FCC's view, MCI was entitled to interconnection for purposes of providing all its authorized services (*i.e.*, all private line services). The task for the Third Circuit was to determine (1) the scope of MCI's authority, and (2) whether these services were within that scope and entitled to interconnection. The court concluded that MCI and the other specialized carriers had authority to offer the full range of private line services; that the services in question were private line services; and that MCI was entitled to interconnection.

As in the Ninth Circuit decision, the finding of limitation to private line services was essential to the Third Circuit decision. If MCI's grants were unlimited, as the D.C. Circuit has held in this case, there would have been no need for the Third Circuit to inquire whether those specific services were authorized. The Third Circuit also considered whether the interconnection requirement was overbroad and concluded that it was not, because it had to be read in the context of the *Specialized Common Carrier Services* decision and was limited thereby to private line services. 503 F. 2d at 1273–74.[29] The Third Circuit, like the Ninth Circuit, thus has construed the scope of specialized carrier authorization as an essential part of a decision; and its construction conflicts with that of the court below.[30] [31]

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[29] The Third Circuit also considered the validity of the underlying *Specialized Common Carrier Services* decision, which had not yet been affirmed by the Ninth Circuit, and conducted essentially the same analysis under this Court's *RCA Communications* decision that the Ninth Circuit later conducted. The Third Circuit similarly relied upon the FCC's findings and warrant of public benefits from the proposed private line services and upon the impact analysis that was limited to private line competition. 503 F. 2d at 1259–63, 1269–74.

[30] See also *American Tel. & Tel. Co.* v. *FCC*, *supra*, 539 F. 2d 767; *MCI Communications Corp.* v. *AT&T*, 369 F. Supp. 1004 (E.D. Penn. 1973), *vacated other grounds*, 496 F. 2d 214 (3d Cir. 1974).

[31] The decision below also conflicts (1) with consistent FCC interpretations of its own policy, *e.g.*, *Customer Interconnection*, 61 FCC 2d 766, 781–83; (2) with representations made by the FCC and the United States in oppositions to certiorari filed in this Court, *e.g.*, *American Tel. & Tel. Co.* v. *FCC*, No. 74–1229, Brief for Respondents in Opposition; *National Ass'n of*

The decision below also conflicts in principle with decisions of this and other courts recognizing that certifying agencies can properly limit their consideration of applications to the services proposed, and that they may commit legal error if they try to grant authority that has not been requested. This Court has held that if an agency permits a certificate holder to operate beyond the terms of its grant, "He who was in substance a highly specialized carrier * * * would be treated as a carrier of general commodities * * *." *Noble* v. *United States*, 319 U.S. 88, 92 (1943).[32] More recently, this Court remanded a case to a three-judge district court to determine the lawfulness of a certificate to the extent that it exceeded the scope of the application. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 299–300 (1974).[33] The court of appeals, in reversing agency action that

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*Reg. Util. Comm'rs* v. *FCC*, No. 74–1550, Brief for the Federal Respondents in Opposition; (3) with views of the congressional oversight committees, *e.g.*, *Agenda for Oversight* (Committee Print), 94th Cong., 2d Sess., prepared by the staff for use of the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce, April 26, 1976; and (4) with legal commentary, *e.g.*, Note, Competition in the Telephone Equipment Industry, 86 Yale L.J. 538 n.1 (1977); Note, Resale and Sharing of Private Line Communications Services, 61 Va. L. Rev. 679, 681–95 (1975).

[32] See also, *Crescent Express Lines* v. *U.S.* 320 U.S. 401 (1943); *Capitol Airways, Inc.* v. *C.A.B.*, 292 F. 2d 755 (D.C. Cir. 1961); *Civil Aeronautics Board* v. *American Air Transport*, 201 F. 2d 189, 193–94 (D.C. Cir.), *certificate dismissed*, 344 U.S. 4 (1952); *Brady Transfer & Storage Co.* v. *U.S.*, 80 F. Supp. 110 (S.D. Iowa), *aff'd*, 335 U.S. 875 (1948). Compare *United States* v. *Seatrain Lines*, 329 U.S. 424 (1947).

[33] On remand, the district court set aside the grant of "excess authority that was and is not supported by any evidence of public need and in regard to which there was no finding of any public need." *Arkansas-Best Freight System, Inc.* v. *U.S.*, 399 F. Supp. 157, 168 (W.D. Ark, 1975), *aff'd*, 425 U.S. 901 (1976). To the extent that MCI offers services outside the rubric of private lines, its authority also lacks supporting evidence and findings of public need. The district court in *Arkansas-Best* also found that authorizations beyond the scope of the application raised serious questions of notice to competing carriers and others who might oppose the application. See also *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U.S. 572, 576, 578–81 (1950). Notice questions would arise also in a grant of unlimited authorization to specialized carriers after a proceeding expressly limited to private line service applications. Compare 47 C.F.R. §§ 63.01(e); 63.52.

is consistent with the principle espoused in these cases, has brought itself into conflict with that principle.

Finally, the decision below conflicts in principle with the rule of *RCA Communications, supra,* 346 U.S. 86, and *Hawaiian Tel. Co.* v. *FCC, supra,* 498 F. 2d 771. Those cases stand for the proposition that the FCC, in considering whether to grant Section 214 authorization for entry into a communications market, "must start from the situation as it then exists," analyze the need for additional service, and determine whether and to whom it should grant a certificate for the proposed service. 498 F. 2d at 776. Under that rule, the FCC may not assume that competition will serve the public interest, but must "warrant" that benefits will flow from a particular authorization. If it cannot so warrant, it may not depart from "the situation as it then exists."

The D.C. Circuit in the Execunet decision would require entry by MCI and other specialized carriers into services the FCC never has analyzed and as to which it has no basis for warranting that competition will "serve some beneficial purpose such as maintaining good service and improving it." 346 U.S. at 97. Such entry would conflict with the venerable principle of *RCA Communications*—a principle established in construction of the very statute that the D.C. Circuit has erroneously construed in this case.

### B. IMPORTANCE OF THE CASE

This case has significance far beyond the question whether MCI can offer a particular communications service called Execunet. The decision leaves in doubt the scope of authorized competition in interstate common carrier communications. If it stands, the decision will expand that scope to services which the FCC had not intended to reach in its decisions up to now and as to which the Commission has not made the statutorily required findings of public convenience and necessity. 47 U.S.C. § 214(a).

The Commission has not declared certain areas, such as MTS and WATS, to be free for all time from competition.[34] But it has represented to the courts, to Congress, to the public, and to all the carriers concerned that its decisions so far have not opened ordinary long distance service to competitive carriers such as MCI. The decision below would work fundamental changes in the Commission's policy by, in effect, eliminating the limitations on the area in which the Commission has found that competition will serve the public interest.

The decision also casts doubt upon the validity of the competitive policies on which MCI and other specialized carriers depend for their existence, and upon their grants of authority pursuant to the policy. The Ninth and Third Circuits affirmed that policy on the essential finding—correct, in our view—that the FCC had lawfully limited it to private line services. This Court two times has denied certiorari presumably on the same premise.[35] The FCC has made numerous grants in application of the policy as affirmed. If this decision stands, there may be relitigation before the FCC and in the courts of issues bearing on competition that the Commission believes were properly resolved in some 14 years of agency and judicial proceedings.[36] This relitigation and the uncertainty it would engender would disrupt and might change fundamentally the structure of the industry—perhaps, ironically, to the detriment

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[34] The suggestion in the opinion below that the FCC has "granted AT&T a *de jure* monopoly over MTS and WATS" (App. A, pp. 15a & n. 39, 29a–30a) has no foundation in the Execunet decision or any other FCC action. The FCC relied in this case not upon anything that had or had not been granted to *AT&T*, but upon the nature and extent of authorization to *MCI*. The established telephone companies have a *de facto* monopoly in MTS and WATS, as the courts often have recognized. *E.g.*, *Nader* v. *FCC*, *supra*, 520 F. 2d at 187; *Amer. Tel. & Tel. Co.* v. *FCC*, *supra*, 487 F. 2d at 868.

[35] *Amer. Tel. & Tel. Co.* v. *FCC*, 422 U.S. 1026 (1975); *National Ass'n of Reg. Util. Comm'rs.* v. *FCC*, 423 U.S. 836 (1975).

[36] *E.g.*, *Washington Util. & Transp. Comm.* v. *FCC*, *supra*, 513 F. 2d 1142; *Bell Tel. Co. of Penn.* v. *FCC*, *supra*, 503 F. 2d 1250; *Microwave Communications, Inc.*, *supra*, 18 FCC 2d 953, 21 FCC 2d 190.

of the very sound competitive policies the FCC has carefully fostered with the approval of the courts.

The disruption and change almost necessarily would extend beyond the specialized carriers to domestic satellite carriers,[37] "value added" carriers with existing certificates,[38] and possibly the new "resale" carriers the FCC anticipates as a result of its recent policy decision on communications brokerage.[39] The FCC has limited or anticipates limiting these carriers in much the same manner as the specialized carriers—to the services they proposed, and, generally to private line services.

Finally, apart from the general policy of competition and the validity of existing grants, the decision would require significant changes in the FCC's certification procedures.[40] If it is not sufficient any more to consider applications on the basis of the proposed services without risking inadvertently broad certification, the FCC will have to adopt procedures that will produce a basis for deciding either to take a chance on open-ended grants or to limit the grants because the public interest affirmatively requires limits. This would slow the certification process immeasurably, might obviate broad policy proceedings such as the specialized common carrier inquiry, and almost certainly would not result in a better or more rational regulatory product.

The fact that the court of appeals remanded the case to the agency for further proceedings does not diminish the importance of obtaining review now. First, any proceeding of the kind the court envisions, to determine whether MTS competition would disserve the public interest, necessarily would take a great deal longer than the specialized common carrier proceeding which considered the narrower and less complex issue

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[37] See note 7, *supra*.

[38] See note 8, *supra*.

[39] *Regulatory Policies Concerning Resale and Shared Use*, note 8, *supra*.

[40] Under FCC regulations, an application for a Section 214 certificate must include, *inter alia*, a statement of "the nature and classification of the communication services to be provided (e.g. telephone, telegraph, facsimile, data, private line, voice, television relay etc.)." 47 C.F.R. § 63.01(e).

of private line competition. Second, it is not at all clear what the status of MCI and other specialized carriers would be in the meantime. If their authorizations, which had been thought limited to private line services, were challenged on grounds that the FCC had not considered the public interest in unlimited competition, the Ninth and Third Circuit decisions might not be dispositive. If their certificates were not valid, MCI and the other specialized carriers might have to stop operating until the FCC had completed its further task as described by the court of appeals.[41] Plainly, final review of this important regulatory matter is appropriate now to avoid the disruption and uncertainty that almost certainly would result if the Court stays its hand.

### C. ERROR OF FEDERAL STATUTORY CONSTRUCTION

The court of appeals misconstrued and misapplied Section 214. The statute on its face authorizes the FCC to "issue such certificates as applied for"—which is just what the agency did in the case of MCI. The specialized carriers generally, and MCI in particular, never sought authorization beyond private line services. The FCC never considered whether competition was feasible or would serve the public interest in areas outside those proposed in the applications. It would have been wasteful of time and resources to consider questions that had not been asked—particularly such difficult questions as whether competition was desirable in the provision of long distance telephone service.[42]

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[41] Similarly, the FCC would have difficulty granting new applications for specialized common carrier certificates until this matter is settled. Understandably, the Commission may not want to issue more certificates until it can be certain what those certificates will authorize.

[42] The questions as to competition in public services are more difficult than those as to private line services. While the FCC on the record in *Specialized Common Carrier Services* could warrant benefits from private line competition and could be assured that the economic impact on established carriers was not sufficient to hurt their service to the public, a far different

(Continued)

Section 214(c) plainly authorizes the FCC to limit or condition certificates in the public interest as well as to grant them "as applied for." But nowhere does the statute demand an "affirmative determination" that the public convenience and necessity require limits when the Commission is granting all that has been asked. Stated differently, nothing in Section 214 requires the FCC to grant more than the carrier has applied for.[43] The court of appeals recognized that "it is analytically impossible to determine the need for a new facility without considering the services to be provided over it." (App. A, p. 22a.) But its ruling in this case would, indirectly, perform the "analytically impossible" act of authorizing MCI to use facilities without FCC consideration of the services to be provided.

By focusing on Section 214(c), moreover, and requiring an "affirmative determination" that the public interest requires limitations, the court below ignored the command of Section 214(a) that the FCC grant only those certificates that the public convenience and necessity require.[44] In making the Section 214(a) determination, the FCC must consider the services

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(Continued)

record would have been required to make similar conclusions as to long distance toll service and WATS. The FCC simply did not reach those questions in light of the applications that prompted the rulemaking proceeding. See 47 C.F.R. § 63.01(e). As Mr. Justice Brandeis wrote, "The duty imposed on the Commission does not extend beyond the need for its action." *New England Division Case*, 261 U.S. 184, 201–02 (1923). An agency need decide only the "real controversy" before it; as to other matters, "there is no occasion for the Commission to act." *Id.*

[43] Indeed, Section 214(c), on which the court of appeals rested its decision, expressly gives the FCC several options as to the action it might properly take on applications. It may grant them "as applied for." It may grant them in part. It may attach such conditions as "in its judgment" the public convenience and necessity may require. And, of course, it may deny them.

[44] The court of appeals also discounted the FCC's authority under Section 303 (a) and (b) to "classify" microwave radio stations and to "prescribe the nature of the service" to be rendered by each class of stations. 47 U.S.C. § 303 (a) and (b). The FCC relied expressly on these provisions of the act in adopting its specialized carrier policy. 24 FCC 2d at 349; 29 FCC 2d at 941.

that are proposed. (App. A, p. 22a.)[45] It cannot be said that the FCC ever has determined whether the public convenience and necessity "require" unlimited operation of MCI's facilities—or even that the public convenience and necessity permit such operation. The court below, we submit, has inferred a requirement from subsection (c) that abrogates the express command of subsection (a); it has reversed the premise that underlies the certification procedure under Section 214.

The Third Circuit, deferring to the FCC's primary jurisdiction in a case involving just the kind of question that MCI raised in this case, held that the FCC was the appropriate agency, by statute as well as by experience, to make such decisions as whether competition should be authorized and to what extent. That court stated:

> Deferral to the FCC under the doctrine of primary jurisdiction is particularly appropriate in this case not simply because of the fact of uncertainty concerning the issue of what private line services have been authorized, but also because of the nature of the issue. For a court to resolve this issue results in a judicial determination of the scope of permissible competition between the specialized carriers, such as MCI, and the existing carriers, such as AT&T. Such a determination, involving, as it must, the comparative evaluation of complex technical, economic, and policy factors, as well as consideration of the public interest, should be made, in the first instance, by the administrative agency which has been entrusted with the primary responsibility for making such a determination and which has the expertise necessary for the development of sound regulatory policy.

*MCI Communications Corp.* v. *AT&T*, 496 F. 2d at 222. Instead of deferring to the FCC's construction of its own statute and policy, the court of appeals in this case has cut the founda-

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[45] See also *Network Project* v. *FCC*, 511 F. 2d 786, 793–94 (D.C. Cir. 1975) (approving the FCC's policy of open entry into the domestic satellite communications field for purposes of providing private line services).

tions from under considered agency policy on the basis of its own novel reading of a statute that has been in regulatory acts at least since 1920.[46] [47]

The court's rule would supplant forty years of consistent FCC interpretation and application of Section 214. The agency always has considered its function under that statute to include evaluating certificates "as applied for" and attaching conditions or limitations as "in its judgment" the public convenience and necessity may require. In the process, the FCC has created numerous classes of limited service carriers.[48] The agency's consistent practice under Section 214 provides an independent reason for this Court to review the decision below.

## CONCLUSION

The Court should grant the writ of certiorari.

Respectfully submitted,

DANIEL M. ARMSTRONG,
*Associate General Counsel.*
JOHN E. INGLE,
*Counsel.*
*Federal Communications Commission,*
*Washington, D.C.* 20554.

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[46] Transportation Act of 1920, 41 Stat. 456, 49 U.S.C. 1 (18). The novelty of the court of appeals' reading is evident from the total absence of supporting authority from that part of its opinion. (App. A, pp. 20a–24a.)

[47] The court of appeals in this case appears to have denied the deference normally owed to agency interpretations of their own decisions because it disagreed with the agency as to how Section 214 should be read. (App. A, p. 28a & n. 67.) This ignores the fact that deference also is due to agency construction of its own organic statutes, particularly when the construction is consistent with past decisions and is rational. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

[48] See, *e.g.*, notes 8 & 9, *supra*. Compare *AT&T*, 27 FCC 113 (1959) (separation between voice and record communications functions in the international market). See also *Capital Telephone Co., Inc.* v. *FCC*, 498 F. 2d 734, 740 (D.C. Cir. 1974) ("When an applicant accepts a government permit which is subject to certain conditions, he cannot later assert alleged rights which the permit required him to surrender in order to receive it.").

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# In the Supreme Court of the United States

OCTOBER TERM, 1977

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FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

*v.*

MCI TELECOMMUNICATIONS CORP., ET AL., RESPONDENTS

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## PETITIONER'S APPENDIX

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DANIEL M. ARMSTRONG,
*Associate General Counsel,*

JOHN E. INGLE,
*Counsel,*
*Federal Communications Commission*
*Washington, D.C. 20554*

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## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 75-1635

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., AND N-TRIPLE-C INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, DATA TRANSMISSION COMPANY (DATRAN), AND SOUTHERN PACIFIC COMMUNICATIONS COMPANY, INTERVENORS

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Petition for Review of Orders of the Federal Communications Commission

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Argued April 28, 1977

Decided July 28, 1977

*Kenneth A. Cox*, with whom *Michael H. Bader*, *William J. Byrnes*, and *Raymond C. Fay* were on the brief, for petitioners.

*John E. Ingle*, Counsel, Federal Communications Commission, with whom *Werner K. Hartenberger*, General Counsel, and *Daniel M. Armstrong*, Associate General

Counsel, Federal Communications Commission, and *Carl D. Lawson*, Attorney, Department of Justice, were on the brief, for respondents. *Ashton R. Hardy*, General Counsel for the Federal Communications Commission at the time the record was filed, entered an appearance for respondent Federal Communications Commission. *James F. Ponsoldt*, Attorney, Department of Justice, entered an appearance for respondent United States of America.

*Michael Boudin*, with whom *Craig D. Miller*, *Alfred C. Partoll*, and *F. Mark Garlinghouse* were on the brief, for intervenor American Telephone and Telegraph Company.

*Thomas J. O'Reilly* was on the brief for intervenor United States Independent Telephone Association.

*John M. Scorce* and *Kevin H. Cassidy* were on the brief for intervenor Data Transmission Company.

*Herbert E. Forrest* entered an appearance for intervenor Southern Pacific Communications Company.

Before WRIGHT, TAMM, and WILKEY, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge*: This is a petition to review two orders of the Federal Communications Commission, each of which requires petitioner MCI Telecommunications Corporation to cease and desist from offering and operating its "Execunet" telephone service.[1] Finding that the Commission has not taken the steps required by the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (1970), to restrict the services MCI may offer over its *existing* facilities, we reverse.

## I. BACKGROUND

MCI Telecommunications Corporation, Microwave Communications, Inc., and N-Triple-C Inc. (hereinafter, collectively, MCI) are affiliated communications common

[1] The orders are a letter order of July 2, 1975 (FCC 75-799) and the *Decision* in *MCI Telecommunications Corp.*, 60 FCC2d 25 (July 13, 1976). The letter order is set out at Appendix B of the second order, 60 FCC2d at 62-64.

carriers which operate a transcontinental point-to-point microwave system catering to business and data communications markets. In the vernacular of the trade MCI is a "specialized common carrier."

The present dispute has its roots in MCI's September 1974 filing of revisions to its tariffs F.C.C. No. 1—the tariff under which MCI furnishes all its interstate services. Those revisions, which became effective October 10, 1974, established rates for a class of "metered use" services, among which was Execunet.[2] With Execunet a subscriber using any push-button telephone (or rotary dial phone and tone generator) can reach any telephone in a distant city served by MCI simply by dialing a local MCI number followed by an access code and the number in the distant city. Execunet customers are billed for each call on a time and distance basis, subject to a monthly minimum.[3]

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[2] Apparently the tariffs do not themselves define Execunet service, but define only certain "modular" services and rates therefor. Putting these modular services together in a particular way results in the Execunet service package. The term "metered use" refers to the fact that charges for some services are set on a usage basis.

[3] Execunet's characteristics are summarized as follows.

> A customer in the calling city calls the local MCI office via local exchange telephone service from any pushbutton telephone in the local exchange area. A rotary-dial telephone can also be used if the caller has a touch-tone pad (tone generator). This device can be purchased in the open market from numerous sources. He then pulses his customer code and the area code and calling number of any telephone in one of a number of distant cities. Connection at the distant end may again be accomplished via the local exchange telephone service in that area. Upon connection, the customer is charged a per-minute toll, based upon the mileage to the city called, subject to a connection charge and a monthly minimum charge. Any MCI Execunet customer in the calling city can access the system at any time to place a call, and presumably many such customers may utilize the intercity facilities simultaneously. In other words, none of the MCI plant, or indeed any of the plant used in completing the call, is dedicated to the use of a particular customer during any specified time; rather it is available upon demand.

*MCI Telecommunications Corp., supra* note 1, 60 FCC2d at 26 n.1.

In the spring of 1975 intervenor AT&T, after subscribing to Execunet and procuring Execunet marketing brochures, complained orally to the Commission that MCI was offering interstate long distance message telephone service (MTS) under the guise of Execunet and that no such service could properly be tariffed by MCI. Apparently AT&T representatives approached individual commissioners and various Commission staff personnel with this complaint and even held a demonstration of Execunet in the Commission's offices. Subsequent to the *ex parte* complaints, AT&T filed with the Commission a letter which repeated the allegations previously made.

The Commission forwarded AT&T's letter to MCI and indicated that MCI's "comments on this matter would be appreciated." [4] MCI wrote a series of letters in return. In the first it took the position that AT&T's complaint was untimely and should be rejected, but that in any case Execunet was a "private line" service which MCI was authorized to offer.[5] By a further letter MCI complained of AT&T's *ex parte* "lobbying" and asked for an opportunity to present its side of the dispute to the Commission.[6] In a third letter MCI pointed out that its licenses were not limited by anything in Section 21.705 of the Commission's rules [7] pursuant to which point-to-point microwave radio licenses are issued to communications

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[4] Letter from FCC to MCI, May 1, 1975, *MCI Telecommunications Corp., supra* note 1, Appendix B, 60 FCC2d at 64, JA 8.

[5] Letter from MCI to FCC, June 5, 1975, *MCI Telecommunications Corp., supra* note 1, Appendix B, 60 FCC2d at 65-68, JA 9-15.

[6] Letter from MCI to FCC, June 9, 1975, *MCI Telecommunications Corp., supra* note 1, Appendix B, 60 FCC2d at 69-70, JA 16-18.

[7] § 21.705 Permissible communications.

> Stations in this service are authorized to render any kind of communication service provided for in the legally applicable tariffs of the carrier, unless otherwise directed in the applicable instrument of authorization or limited by § 21.701 or § 21.703 [the latter rules relating to frequency use]. * * *

47 C.F.R. § 21.705 (1976).

common carriers.[8] It also called the Commission's attention to AT&T's comments in Rulemaking Docket 19117,[9] in which AT&T had taken the position that the Commission had no statutory authority to require prior approval of new services that were to be offered over existing facilities of a domestic carrier, but instead could regulate such services, if at all, only under the tariff provisions of the Communications Act. In MCI's view, AT&T's position in Docket 19117 [10] denies the authority asserted by the Commission in the instant proceeding on AT&T's behalf. MCI also pointed out that the report in Docket 19117 states that new service offerings could be proposed by merely filing a tariff.[11]

Without holding a hearing or even disclosing the details of AT&T's arguments concerning the unlawfulness of Execunet, the Commission on July 2, 1975 wrote a letter to MCI which stated: "[Y]our tariff F.C.C. No. 1 is hereby rejected insofar as it purports to offer Execunet service, but without prejudice to MCI's offering any other service which you are authorized to provide." [12] The rationale for this order was explained in the body of the letter.

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[8] Letter from MCI to FCC, July 1, 1975, *MCI Telecommunications Corp., supra* note 1, Appendix B, 60 FCC2d at 80-84, JA 39-48.

[9] *In the Matter of Establishment of Rules Pertaining to the Authorization of New or Revised Classifications of Communications on Interstate or Foreign Common Carrier Facilities, and Amendment of Part 63.60—63.90 of the Rules, Notice of Proposed Rule Making*, 27 FCC2d 36 (1971); *Report and Order*, 39 FCC2d 131 (1973).

[10] *See Letter, supra* note 8, 60 FCC2d at 82-83, JA 44-46.

[11] "[T]he termination of the rule making proposed herein will make it possible for domestic carriers, as a general rule, to offer new classes or subclasses of communications service over duly authorized facilities merely by the filing of appropriate tariff revisions * * *." *Report and Order, supra* note 9, 39 FCC2d at 135.

[12] *MCI Telecommunications Corp., supra* note 1, Appendix B, 60 FCC2d at 64.

First, the Commission concluded that MCI could offer only "private line" communications services over its existing facilities:

> In the various Commission orders granting the Section 214 applications of the MCI carriers to construct and operate facilities (e.g., 32 F.C.C.2d 36 (1971), FCC 72-456 (May 26, 1972), FCC 72-832 (September 22, 1972), FCC 72-852 (September 29, 1972)), appears language similar to the following:
>
> > The service proposed is essentially private line for the transmission of data, facsimile, control, remote metering, voice and other communications.
>
> Each grant refers to the paragraph which incorporates the above language as conditioning the grant of construction and operating authority. As a result, MCI is only permitted to operate its facilities for private line services.
>
> Further, in our *Second Report* on domestic satellites, which followed the *Specialized Common Carrier* decision, we pointed out (35 F.C.C.2d 844, 853 (1972)):
>
> > In encouraging multiple entry and the development of competition in the supply of domestic communications, we have maintained a distinction between the so-called monopoly switched telephone services now being furnished by AT&T and all other classes of existing and potential specialized services.
>
> It is thus clear that MCI sought authorization to offer only private line services, and that it was granted authority to offer only such services. [13]

The Commission then rejected MCI's arguments that Execunet was a private line service like AT&T's "foreign

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[13] *Id.* at 63.

exchange" (FX) service, deciding instead that "the combination of * * * similarities" between Execunet and AT&T's MTS made Execunet "essentially a switched public message telephone service * * *." [14]

MCI immediately filed a petition for review in this court and sought a stay of the Commission's order, arguing that the Commission had failed to comply with Section 4 of the Administrative Procedure Act,[15] its own rules governing informal complaints,[16] its own rules governing *ex parte* contacts,[17] Sections 204 and 205 of the Communications Act, 47 U.S.C. §§ 204-205 (1970), and the Due Process clause. The request for a stay was granted.[18] Subsequently the Commission, which had previously refused to allow MCI any kind of hearing, moved to have the proceedings remanded so that it could consider matters more fully than it had previously. This motion was granted, although jurisdiction was retained.

In December 1975 the Commission issued an order commencing the proceedings on remand. *MCI Telecommunications Corp.*, 57 FCC2d 271 (1975), SA 49.[19] It announced that comments and reply comments would be accepted and that oral argument or an evidentiary hearing might be held if warranted by the written submissions. The issue to be resolved was said to be "whether or not Execunet is a service which MCI is authorized to offer pursuant to its facility authorizations and policies

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[14] *Id.*

[15] 5 U.S.C. § 553 (1970).

[16] 47 C.F.R. §§ 1.711-1.735 (1976).

[17] 47 C.F.R. §§ 1.1201-1.1251 (1976). *See also Rules Governing Ex Parte Communications*, 1 FCC2d 49 (1965).

[18] This court initially stayed the Commission's order in its entirety. After the proceedings on remand our order was modified to allow MCI to continue to serve its present customers, but solicitation of new customers was not permitted.

[19] "SA" refers to a two-volume Supplemental Appendix covering the proceedings on remand.

set forth by this Commission."[20] On March 26, 1976 the Commission announced that it would hold oral argument and designated the issues to be addressed at that time. The issues the Commission identified as having been raised by the comments and reply comments were the following:

a. What class or classes of service is MCI permitted to offer pursuant to its facility authorizations and Commission policies?
b. What changes, if any, were made to the permitted classes of service by our Report and Order in Docket 19117, 39 FCC2d 131 (1973)?
c. Is Execunet service, as presently offered, a private line service?
d. Were any communications between parties to this proceeding and the Commission, as developed by filings herein, in violation of any applicable statute or regulation?
e. If any prohibited contacts occurred, what effect have they had on the substance of this proceeding?
f. Whether any further proceedings are required to comport with the requirements of due process of law.

*MCI Telecommunications Corp.*, 58 FCC2d 962, 963 (1976), SA 812.

Prior to oral argument the Commission issued yet a third order responding to procedural motions made by MCI at various points during the comment period. *MCI Telecommunications Corp.*, —— FCC2d —— (FCC 76-441, May 17, 1976), SA 892. In this order the Commission rephrased the primary issue before it as "whether MCI's facility authorizations and Commission policies restrict in any way the broad categories of serv-

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[20] *MCI Telecommunications Corp.*, 57 FCC2d 271, 271-272 (1975), SA 49-50.

ice which MCI may offer." [21] It also stated that the proceedings would not be expanded to include consideration of "whether it is in the public interest for MCI to offer Execunet regardless of whether it is within the class of services it may offer." [22] Finally, the Commission for the first time mentioned the statutory authority for its actions: "th[is] proceeding is an investigation into the lawfulness of MCI's Execunet service offering, conducted pursuant to Sections 4(i), 4(j), 201, 204, 205, 208 and 403 of the Communications Act of 1934, as amended, 47 USC 154(i), 154(j), 201, 204, 205, 208 and 403." [23]

After oral argument the Commission issued an extensive opinion, again finding that MCI was not authorized to offer Execunet. *MCI Telecommunications Corp.*, 60 FCC2d 25 (1976). The approach taken in that opinion is materially different from that taken in the July 1975 letter order, however. Whereas the letter order had relied on express restrictions written into MCI's facilities authorizations (the certificates of public convenience and necessity issued pursuant to Section 214(a) of the Communications Act, 47 U.S.C. § 214(a) (1970)),[24] the opinion on remand stated:

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[21] *MCI Telecommunications Corp.*, —— FCC2d —— (FCC 76-442, May 17, 1976), SA 894.

[22] *Id.*, SA 895.

[23] *Id.*

[24] (a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line * * *. * * * No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby * * *. As used in this section the term "line" means of channel of

> As MCI points out, however, not all of its authorizations contain similar language [*i.e.*, restrictions], some contain no such restrictions, and thus it is necessary to look further, to our expressed policies and to judicial statements, to ascertain the limits on [specialized common carrier] services. [25]

The Commission's "further look" began with a review of the seminal *Specialized Common Carrier* decision,[26] pursuant to which most specialized carrier facilities authorizations have been issued. The purpose of that decision was to facilitate the Commission's handling of Section 214 applications by determining by rulemaking "[w]hether as a general policy the public interest would be served by permitting the entry of new carriers in the specialized communications field * * *." [27] While the Commission apparently concedes that it did not define the boundaries of the "specialized communications field," [28] it asserts that the services to be offered over the facilities covered in some 1,700 Section 214 applications before it provided a touchstone for its analysis and that all such services were "private line." Accordingly, it is

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> ...unication established by the use of appropriate equipment, ...ther than a channel of communication established by the interconnection of two or more existing channels: *Provided however*, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or ...r changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

[25] *MCI Telecommunications Corp., supra* note 1, 60 FCC2d at 35.

[26] *Specialized Common Carrier Services*, 29 FCC2d 870 (1971), *aff'd sub nom. Washington Utilities & Transportation Comm'n* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). *See also Bell Telephone Co.* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975); *AT&T* v. *FCC* [*United States Transmissions Systems, Inc.*], 539 F.2d 767 (D.C. Cir. 1976).

[27] *Specialized Common Carrier Services, supra* note 26, 29 FCC2d at 878.

[28] *See* note 68 *infra*.

the Commission's position that it did not consider services other than private line services in determining the public interest ramifications of competition.[29] As an example of this the Commission points to its analysis of "cream-skimming," the argument that specialized carriers will upset the established rates of general carriers (such as AT&T) by siphoning off high-profit business.[30] The Commission's interpretation here of its discussion of cream-skimming in *Specialized Carriers* is that it found allegations of cream-skimming to be unfounded only because the specialized carriers were not proposing to compete

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[29] 35. At the time of the *Specialized Common Carrier* decision, we had before us 1712 microwave applications from 33 applicants, 17 of which were affiliated with MCI. Accordingly, the statements of MCI as to the types of services it proposed to offer were of importance in the policy determination made therein and are helpful in ascertaining the limits, if any, imposed upon Specialized Common Carrier (SCC) service offerings. The MCI applications considered were for "portions of a proposed nationwide network to provide specialized *private line* communications services" (emphasis added) 29 FCC2d at 874. We further quoted MCI's pleadings that "the real distinction which delineates MCI service from anything provided today by existing common carriers is not the facility itself but the manner in which a customer may utilize it in order to provide a customized intra-company point-to-point communications system of his own design and capability" 29 FCC2d at 875. Finally MCI asserted that there was a distinct difference between a public telephone service which is a natural monopoly and a customized communications service offered on a private line basis, *Id.* [*sic*] Thus, MCI sought therein to offer only private line, point-to-point services. * * *

*MCI Telecommunications Corp., supra* note 1, 60 FCC2d at 36. *See also* FCC Letter Order, *id.*, Appendix B, 60 FCC2d at 62:

> *Specialized Common Carrier Services*, 29 F.C.C. 2d 870 (1971), which established the Commission's policies regarding entry of the specialized common carriers in competition with AT&T, contemplated such entry only in the private line field, not in the area of switched public message telecommunications service. * * *

[30] *See Specialized Common Carrier Services, supra* note 26, 29 FCC2d at 910 (¶ 78).

"to any substantial degree" with AT&T's monopoly service offerings, MTS and WATS.[31]

Having concluded that the *Specialized Common Carrier* decision makes no reference to competition in other than private line areas, the Commission turned next to MCI's allegations concerning the meaning of the Commission's Rule 21.705, 47 C.F.R. § 21.705 (1976), and its orders in Docket 19117.

Rule 21.705 governs the scope of licenses granted carriers in the point-to-point microwave service. Its operative language is that a carrier may offer any service "provided for in the *legally applicable tariffs* of the carrier, unless otherwise directed in the applicable instrument of authorization * * *" (emphasis added). MCI, focusing on the second phase, had argued that the absence of any directions in its instruments of authorization indicated that it was free to offer by tariff *any* communications service that could physically be provided on its existing system. The Commission, on the other hand, took the position that the italicized language is the key and that tariffs exceeding the bounds of the *Specialized Carrier* decision can never become "legally applicable." Thus in the Commission's view Rule 21.705 merely "expresses the truism that a carrier need not generally file an application [under Section 214] for each new service it wishes to offer, [and therefore] it cannot be used to reverse a clearly defined Commission policy." [32]

The Commission takes a similarly narrow view of the effect of its *Report and Order* in Docket 19117. That docket was started to consider whether domestic carriers should be required to get Commission approval before filing tariffs proposing services not previously provided

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[31] *MCI Telecommunications Corp., supra* note 1, 60 FCC2d at 36, quoting *Specialized Common Carrier Services, supra* note 26, 29 FCC2d at 915.

[32] *Id.* at 38.

or set out in a Section 214 application.[33] The purpose of the proposed rules was threefold: to decide the public interest ramifications of a service before it was commenced, thereby protecting the public from service disruptions that might be caused if the service were allowed to go into effect and later enjoined; to put general domestic carriers (such as AT&T and Western Union), which could theretofore start a new service simply by filing a tariff, on an equal footing with international and domestic miscellaneous carriers whose facilities authorizations were always restricted so that new services required further Section 214(a) proceedings; and to protect entrants to the specialized carrier field who also needed prior approval of entry under Section 214(a) from unfair competition from the generalized carriers.[34] The proposed rules were never adopted, and restrictions in facilities authorizations which had worked a result similar to the proposed rules were expressly declared "null and void" in the order terminating the docket.[35]

MCI argued before the Commission that the result of Docket 19117 was that any express restrictions in its facilities authorizations were lifted and that it should be free as a result of the order terminating the docket to propose new services simply by filing a tariff, even if it was not free before. The Commission's response was that Docket 19117 was not concerned with competition except in the specialized carrier field—the only field in which competition was allowed at the time of the *Report and Order* in that docket.[36] Thus the Commission's view apparently is that existing specialized carriers are allowed to offer private line services free of any prior approval requirement as a result of Docket 19117, but

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[33] *See Notice of Proposed Rule Making, supra* note 9, 27 FCC2d at 38-39.

[34] *Id.* at 39.

[35] *See Report and Order, supra* note 9, 39 FCC2d at 137.

[36] *MCI Telecommunications Corp., supra* note 1, 60 FCC2d at 39.

are required to proceed by Section 214 application with respect to all other services.

In the remainder of the opinion below the Commission again concluded that Execunet was not a private line service.[37] It also concluded that no facts were in dispute which required an evidentiary hearing and denied MCIs motion for one.[38] The Commission for a second time refused to consider whether Execunet should be permitted regardless of the scope of the *Specialized Common Carrier* decision, and further indicated that it had intended to confer on AT&T a monoply over MTS and WATS by its ruling in *Specialized Carriers*, a decision that could not be changed absent a demonstration of changed circumstances.[39] Finally, the Commission refused to inquire further into the *ex parte* contact problem on the ground that all such contacts had occurred before commencement of formal proceedings and were, therefore, proper under both court and Commission rulings.[40]

On this petition for review MCI has challenged virtually every ruling of the Commission in the proceeding on remand and has renewed its attack on the July 1975 letter order.

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[37] *See id.* at 40-44.

[38] *Id.* at 44-48.

[39] [W]e disagree with MCI that we have never defined the areas of telecommunications service which should be open to competition and those which are a monopoly. Rather, that was the principal purpose of our investigation in [*Specialized Carrier Services, supra* note 26]. * * *

* * * *

109. In essence MCI is * * * asking us to reopen the *Specialized Common Carrier* decision to determine again what services should be open to competition. We decline to do so. * * * There is no allegation that the public interest considerations upon which the *Specialized Common Carrier* [was] based have changed at all * * *.

*MCI Transcommunications Corp., supra* note 1, 60 FCC2d at 56-57.

[40] *Id.* at 48-54.

## II. Analysis

### A.

The implicit restrictions argument advanced by the Commission in its opinion on remand represents a substantial departure from prior administrative practice. As the Commission's letter order suggests, the usual way in which a carrier becomes restricted in the services it may offer is for the Commission to write restrictions into the facilities authorizations that must be obtained pursuant to Section 214 of the Communications Act before any communications line may be built, operated, or extended.[41] Accordingly, a carrier can usually tell if it is subject to service restrictions simply by examining the instruments of authorization issued to it by the Commission. Section 21.705 of the Commission's rules, 47 C.F.R. § 21.705 (1976), which governs the manner in which point-to-point microwave radio licenses can be used by specialized carriers such as MCI, similarly recognizes that the usual place to find restrictions on services is in the "applicable instrument of authorization." *See also* 47 U.S.C. § 309(h)(1) (1970) (which indicates that restrictions will usually be found in the license instrument); 47 C.F.R. § 21.903(b) (1976) (instrument of authorization controls in part services that may be offered on a multi-point distribution system).

The Commission's discussion of its administrative practice in Docket 19117 is also instructive. There the Commission explained that in the absence of restrictions imposed under Section 214 in the facilities authorizations, carriers could offer any service which could physically be provided over their existing systems simply by filing a tariff.[42] This discussion clearly indicates that the Commis-

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[41] *See* text at note 13 *supra*; note 24 *supra*.

[42] *See Notice of Proposed Rule Making*, *supra* note 9, 27 FCC2d at 38; *Report and Order*, *supra* note 9, 39 FCC2d at 133.

sion's understanding of Section 214 of the Act has until now been that explicit action is necessary to restrict a carrier to the service offerings it proposed when it sought authority to build, operate, or extend its communications lines.

Finally, as evidenced by the decision in *Press Wireless, Inc.*, 25 FCC 1466 (1958), *aff'd, sub nom. Press Wireless, Inc. v. FCC*, 264 F.2d 372 (D.C. Cir. 1959) (*per curiam*), the Commission has from time to time exercised its express authority under Section 303(b) of the Act, 47 U.S.C. § 303(b) (1970), to "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class" by promulgating rules setting out limitations on services to be offered over radio facilities. *See, e.g.*, 47 C.F.R. §§ 21.509, 21.606, 21.903 (1976). In this regard it is instructive to note that the Commission has *not* enacted any comparable service restrictions for point-to-point microwave licensees and in particular it has *not* made the definition of "private line service" set out in 47 C.F.R. § 21.2 (1976) applicable to such licenses, although this would certainly seem to be the natural thing to have done had the Commission sought to restrict specialized carriers to private line service offerings.

The fact that an administrative practice is novel does not, of course, mean that it is wrong. However, novelty is a warning signal that all may not be well, especially in the instant case in which the Commission has itself failed to discuss the statutory warrant for the new course it has adopted. When the Communications Act is considered in detail, it becomes apparent that novelty has led to error in this case.

B.

To frame our analysis, we sketch at the outset some principles which are either uncontested or uncontestable. First, it is settled that "a tariff [may] be rejected if it is unlawful without prior agency approval and approval

has not been obtained." *Associated Press v. FCC*, 448 F.2d 1095, 1103 (D.C. Cir. 1971); *accord, Press Wireless, Inc. v. FCC, supra.*[43] Yet the power to require prior agency approval is itself circumscribed, for it is well recognized that the tariff provisions of the Communications Act (Sections 203-205, 47 U.S.C. §§ 203-205),[44] like the cognate sections of the Interstate Com-

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[43] *See also North Central Truck Lines, Inc.* v. *ICC*, —— F.2d ——, —— (D.C. Cir. No. 76-1597, decided June 6, 1977) (slip op. at 4); *Delta Airlines, Inc.* v. *CAB*, 543 F.2d 247, 254 (D.C. Cir. 1976); *Municipal Light Boards of Reading & Wakefield, Mass.* v. *FPC*, 450 F.2d 1341, 1345-1346 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972).

MCI has vigorously argued that rejection of a tariff is not possible once a tariff has become effective. We need not decide whether this is so since, as this case comes to us after remand, no facts material to the issues thus far decided by the Commission are in dispute and, accordingly, the Commission could, as it apparently did, issue a cease and desist order pursuant to 47 U.S.C. § 205 (1970) without more of a hearing than has already been afforded MCI. Thus, even if the Commission was without power to reject a tariff as that phrase is used as a term of art, it was empowered to reject the Execunet tariff in a practical sense.

[44] Under the Communications Act the practices of *existing* carriers using *existing* facilities are regulated primarily through the tariff mechanism established in §§ 203-205 of the Act, 47 U.S.C. §§ 203-205 (1970). Section 203 obliges carriers to file tariff schedules with the Commission and to make such schedules available to the public. Section 203(b) expressly recognizes that changes in the services a carrier may offer will be commenced with a tariff filing. Operation except in strict compliance with applicable tariffs is prohibited, 47 U.S.C. § 203(c), as are discriminations and preferences, *id.* § 202. Prior to the effective date of a tariff—a date certain that must be set out in the tariff, *id.* § 203(d)—the Commission may suspend the tariff and hold a hearing concerning the lawfulness thereof. *Id.* § 204. If the hearing has not been completed within three months (five months as of 1976, *see* 47 U.S.C.A. § 204 (1977 pocket part)) after the effective date of the suspended tariff, that tariff by law goes into effect. *Id.* After the effective date, and without regard to whether a tariff has previously been suspended, the Commission may hold a hearing on the lawfulness of the tariff, although the tariff must be allowed to remain in effect pending the outcome of such a hearing. *Id.* § 205; *see AT&T* v. *FCC*, 487 F.2d 865, 874-875 (2d Cir. 1973). Subsequent to a hearing under either § 204 or § 205 the Commission may prescribe such rates,

merce Act (49 U.S.C. §§ 15(1), 15(7) (1970)),[45] embody a considered legislative judgment that carriers should in general be free to initiate and *implement* new rates or services over existing communications lines unless and until the Commission, after hearing, determines that such rates or practices are unlawful, subject only to a limited period of suspension set out in the statute. *AT&T v. FCC*, 487 F.2d 865, 870-881 (2d Cir. 1973); *see United States v. SCRAP*, 412 U.S. 669, 697 (1973) (interpreting Interstate Commerce Act); *Arrow Transportation Co. v. Southern R. Co.*, 372 U.S. 658, 662-669 (1963) (same).[46] As the Second Circuit explained in the *AT&T* case in overturning a Commission requirement that AT&T obtain approval prior to filing tariff revisions:

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classifications, regulations, or practices as shall be determined to be just, fair, and reasonable, and it may enjoin the carrier from continuing services except as prescribed. 47 U.S.C. §§ 204, 205.

[45] "Section 204 * * * is adapted from section 15(7) of the Interstate Commerce Act so as to apply to communications. * * * Section 205 follows sections 15(1) and 16(8) of the Interstate Commerce Act * * *." S. Rep. No. 781, 73d Cong., 2d Sess. 4 (1934). *See aslo* H.R. Rep. No. 1850, 73d Cong., 2d Sess. 5-6 (1934).

[46] Since the most likely objection to MCI's provision of Execunet service is its potential effect on AT&T's MTS, it is useful to note that the Supreme Court, in *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U.S. 658, 669 (1963), rejected the claim that a court should have the power to extend the statutory suspension period to protect competitors of a carrier and their customers:

> It must be admitted that Congress dealt with the problem as it affected the relations between shippers and carriers, making no express reference to the interests of competing carriers and their customers such as are involved in this case. We see no warrant in that omission, however, for a difference in result. * * *

In noting that neither claims of a carrier's customers nor those of its competitors or competitors' customers in any way abridge the right of a carrier to implement a new rate or service, we do not intend to suggest that a showing of harm to competitors or competitors' customers would be insufficient to sustain a service restriction promulgated in accord with 47 U.S.C. § 214(c) (1970) or 47 U.S.C. § 303(b) (1970). Our only point is that allegations of harm to competitors or competitors' customers do not in any way expand the Commission's suspension or rejection powers.

> In enacting Sections 203-05 of the Communications Act, Congress intended a specific scheme for carrier initiated rate revisions. A balance was achieved after a careful compromise. The Commission is not free to circumvent or ignore that balance. Nor may the Commission in effect rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation.[47]

The Second Circuit, moreover, rejected the Commission's argument that the general grants of procedural authority in Sections 4(i), 4(j), and 403 of the Act, 47 U.S.C. §§ 154(i), 154(j), 403 (1970), empowered the Commission to erect prior approval requirements like that imposed on AT&T, although it recognized that the Commission would have the power to reject a tariff whenever a section of the Act expressly establishes or authorizes[48] a prior approval requirement.[49]

Applying these principles to the instant case, the issues to be resolved are two: whether and to what extent Section 214 of the Communications Act expressly authorizes the Commission to impose prior approval requirements through the facilities authorization mechanism, and whether the Commission has properly exercised whatever authority it may have under Section 214.

Section 214 establishes the Commission's regulatory charter over entry into the common carrier communications field and states that no carrier shall construct, extend, or acquire a line unless the Commission has first affirmatively determined that such entry would be in the

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[47] *AT&T* v. *FCC*, *supra* note 44, 487 F.2d at 880 (footnote omitted).

[48] Of course, if the statute merely authorizes the Commission to impose a prior approval requirement, as is the case with § 303(b), 47 U.S.C. § 303(b) (1970), that authority would have to be exercised before rejection is proper.

[49] *AT&T* v. *FCC*, *supra* note 44, 487 F.2d at 876-881 & 880 n.13, citing *Associated Press* v. *FCC*, 448 F.2d 1095, 1103 (D.C. Cir. 1971).

public interest.[50] The primary purpose of Section 214 (a) is prevention of unnecessary duplication of *facilities*, not regulation of services.[51] Because of this, Section 214 would appear to have a limited office with respect to regulation of service offerings on existing lines. We have held as much,[52] and this view is confirmed by the final proviso to Section 214(a) which states expressly that

> nothing in this section [214] shall be construed to require a certificate or other authorization from the Commission for any * * * changes in plant, *operation*, or equipment, *other than new construction*, which will not impair the adequacy or quality of service provided.[53]

Moreover, we do not agree with the suggestion of Commission counsel in brief[54] that Judge Wilkey's opinion

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[50] *See* note 24 *supra*.

[51] *See* 78 CONG. REC. 10314 (1934) ("The section [§ 214] is designed to prevent useless duplication of facilities, with consequent higher charges upon the users of services."). It is also clear that § 214 was intended to apply only to constrution or acquisition of new lines. *See id.*; H.R. Rep. No. 1850, *supra* note 45, at 6; S. Rep. No. 781, *supra* note 45, at 5; *accord, Western Union Telegraph Co.* v. *FCC*, 541 F.2d 346, 355 (3d Cir. 1976); *United Telegraph Workers* v. *FCC*, 436 F.2d 920 (D.C. Cir. 1970).

Of course, § 214 also applies to abandonment of service, *see* note 24 *supra*, but no one has so far contended that Execunet will have any impact, adverse or otherwise, on provision of pre-existing MCI services.

[52] In the first Western Union Mailgram case, *United Telegraph Workers* v. *FCC*, *supra* note 51, the Telegraph Workers sought to force the FCC to enjoin Mailgram service pending a hearing at which § 214 issues could be ventilated. The Commission, on the other hand, maintained that the Mailgram tariff should be processed in the same manner as any other tariff filing. This court sided with the Commission on the ground that (with exceptions not relevant here) § 214 did not apply to even this novel use of existing facilities. *See* 436 F.2d at 924-925.

[53] 47 U.S.C. § 214(a) (1970) (emphasis added); *see* note 24 *supra*.

[54] FCC brief at 24 & n.14, 32 n.23.

in *Hawaiian Telephone Co. v. FCC*, 498 F.2d 771 (D.C. Cir. 1974), somehow transmogrifies Section 214(a) so that carriers must now obtain Commission approval before they implement new services.[55] In *Hawaiian Telephone* this court reversed a grant of Section 214 authority to RCA Global Communications, Inc. on the ground that the Commission was allowing competition merely for competition's sake in direct violation of the teaching of the Supreme Court in *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953). In stating the proper standard to be applied under Section 214(a) Judge Wilkey wrote: "When the FCC considers an application for certification of a new line, it must start from the situation as it then exists, and must * * * determine whether indeed the public convenience and necessity requires more or better *service*." 498 F.2d at 776 (emphasis added). We do not read this statement to suggest that every time a carrier seeks to start a new service over existing facilities it must petition the Commission under Section 214(a), but rather it is merely a matter of fact observation that it is analytically impossible to determine the need for a new facility without considering the services to be provided over it. In addition, the reading suggested by the Commission would nullify the final proviso of Section 214(a) by requiring a "certificate

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[55] If this were the case, then there would obviously have been no need for the rulemaking in Docket 19117 which proposed rules that would have required "common carriers [to] request prior Commission approval before offering or discontinuing any new or revised classification of communications, irrespective of whether offered over proposed new facilities or over facilities previously authorized by the Vommission [*sic*]." *Notice of Proposed Rule Making, supra* note 9, 27 FCC2d at 38-39. Similarly, if the Commission is now correct, then both the Commission and this court were in error in *United Telegraph Workers* v. *FCC, supra* note 51. *See* note 52 *supra. See also MCI Telecommunications Corp., supra* note 1, 60 FCC2d at 38 ("a carrier need not generally file an application [under § 214] for each new service it wishes to implement").

[and] other authorization from the Commission" prior to changes in carriers' operations even if such changes did not affect the "adequacy or quality" of the carriers' preexisting services. There is no indication that the *Hawaiian Telephone* court contemplated such a remarkable result. Nor, indeed, can such a result be justified by reference to the primary purpose of Section 214 because, so long as the "adequacy or quality" of the service proposed in a Section 214(a) application is not impaired by provision of other services, the public need that justified construction of facilities will still be met and there is no sense in which those facilities would have become needlessly duplicative.

Notwithstanding the proviso to Section 214(a), Section 214(c) gives the Commission authority to[56]

> issue such certificate [facility authorization] as applied for * * * or for the partial exercise only of such right or privilege, and may attach to the issu-

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[56] Section 214(c) provides:

> The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

47 U.S.C. § 214(c) (1970).

> ance of the certificate such terms and conditions *as in its judgment the public convenience and necessity may require.* * * *

(Emphasis added.) Used to condition the services an individual carrier may offer, Section 214(c) would provide a power over individual carriers in all respects identical to its power over classes of carriers under Section 303(b), which was held in *Press Wireless, Inc. v. FCC, supra,* to give the Commission authority to create a prior approval requirement. For this reason Section 214(c) does, in our judgment, authorize the Commission to restrict the services that may be offered over a communication line once it is built, acquired, or extended. *Cf. Western Union Telegraph Co. v. FCC,* 541 F.2d 346, 355 (3d Cir. 1976). However, since any prior approval requirement is in derogation of the legislative compromise embodied in Sections 203-205, the Commission must strictly follow the terms of Section 214(c) and it cannot impose any such restriction unless it has affirmatively determined that "the public convenience and necessity [so] require."

C.

With the framework of our inquiry in mind, we turn next to the question whether the Commission was correct in concluding that the *Specialized Common Carrier* decision was a lawful exercise of Section 214(c) authority. As we understand the Commission's opinion on remand, there are two considerations supporting its view that the *Specialized Common Carrier* decision restricted the services specialized carriers can offer—first, the fact that only private line services were before the Commission in Section 214 applications[57] and, second, that the Commission's analysis of cream-skimming assumed that special-

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[57] *See* note 29 *supra.*

ized carriers would be restricted to private line services.[58] We consider these in turn.[59]

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[58] [O]ur analysis of possible revenue diversion (29 FCC2d at 911-914) dealt only with the private line revenues of these two carriers. Further, we recognized that SCC's would not compete directly with the established carriers' message services.

> "There is no reason to believe that [nationwide average] pricing of the interstate message service offerings of the Bell System and Western Union (such as MTT, WATS, and public telegraph) need be altered by new entry into the developing specialized communications market. Clearly, none of the uniform rate structures of the existing carriers for such services would appear in jeopardy *since those services are not being challenged competitively to any substantial degree by the services proposed to be offered by the aspiring new entrants.*" 29 FCC2d at 915 (emphasis added) [.]

*MCI Telecommunications Corp., supra* note 1, 60 FCC2d at 36.

[59] The Commission offered two other considerations in support of its interpretation of *Specialized Common Carrier Services, supra* note 26. First, it concluded that specialized carriers would not duplicate services already being offered, whereas in the Commission's view Execunet would duplicate MTS. We fail to see the relevance of this assertion in light of *AT&T* v. *FCC, supra* note 26.

The Commission also pointed to statements made by the Ninth and Third Circuits in, respectively, *Washington Utilities & Transportation Comm'n* v. *FCC, supra* note 26, and *Bell Telephone Co.* v. *FCC, supra* note 26. In *Washington Utilities*, however, the scope of the services authorized in *Specialized Carriers* was not at issue; the reference is simply a general description of the services proposed in the applications before the Commission. The *Bell Telephone* case involved a very different issue, namely, whether the Commission had affirmatively determined that it would be in the public interest to require AT&T to interconnect with MCI for the purpose of allowing MCI to offer FX and CCSA service. *See* 47 U.S.C. § 201(a) (1970). The Commission's view was that *Specialized Carriers* had settled the point, whereas AT&T argued that, since MCI had never mentioned FX and CCSA services in its § 214(a) applications, MCI's provision of those services had not been approved even if some other carriers' might have been. The Third Circuit held that the Commission in *Specialized Carriers* had made an affirmative determination that interconnection for provision of private line services was a general matter in the public interest and that MCI was covered by this general determination. *Bell Telephone* therefore stands for the proposition that the Commission in *Specialized Carriers* decided at least that specialized carriers could provide all private line services.

We can assume, without deciding, that a service like Execunet was not within the contemplation of the Commission when it made the *Specialized Carrier* decision. Nonetheless, it is readily apparent that failure to consider the public interest ramifications of a service—either pro or con—during resolution of a Section 214(a) application is simply not the same thing as an affirmative determination that the "public convenience and necessity may require" [60] a restriction on a facility authorization limiting a carrier to provision solely of those services proposed in its Section 214(a) application.

The Commission's analysis of cream-skimming in the *Specialized Common Carrier* decision similarly gives no evidence that the Commission made an affirmative finding that revenue diversion would be a problem if specialized carriers were allowed to compete on the fringes of the message telephone service market as MCI allegedly proposes to do. No such issue was before the Commission in that proceeding. As it has repeatedly asserted here, all it had to consider was whether the competition proposed in the Section 214 applications before it raised serious revenue diversion problems threatening the public interest. This is all it apparently did decide:

> [W]e do not see how there could be any diversion of revenues of a magnitude to have the impact claimed by AT&T, in view of the very small percentage of AT&T's existing total market that is vulnerable to competition of the kind proposed here, the growth rate of Bell's basic services, and the likelihood that AT&T would obtain a very substantial share of the potential market for specialized services.[61]

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However, one cannot reason from this proposition to its converse—that specialized carriers may offer only private line services—yet the converse is the issue relevant under § 214(c) as we explain in text.

[60] 47 U.S.C. § 214(c) (1970).

[61] *Specialized Common Carrier Services, supra* note 26, 29 FCC2d at 910.

Moreover, the Commission's staff report, which formed the basis for the *Specialized Carrier* decision, ruminated more broadly on the issue posed by revenue diversion and it appeared highly skeptical of the validity of AT&T's overall argument.[62] Thus there is simply nothing in *Specialized Carriers* that would support a conclusion that revenue diversion required restrictions on MCI's facility authorizations.[63]

Finally, it should also be noted that the Commission staff, in its report adopted by the Commission,[64] dealt explicitly with the question of how the Commission ought to deal with possible adverse impacts of service offerings other than those which were before the Commission in the *Specialized Common Carrier* decision:

> In the event that adverse consequences to the public should develop, the Commission can take such action *on the relevant tariff filings* as may be necessary to protect the public. We think that in the context of the matters now before the Commission involving proposed new and different services, *a question of this nature is more appropriately considered in connection with the tariffs rather than upon authorization of the facilities.*[65]

And, again, the staff wrote:

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[62] *See id.* at 883-884.

[63] It should also be noted that subsequent to *Specialized Carriers* the Commission has indicated a willingness to consider competition in the message telephone field on its merits. *See Domestic Communications-Satellite Facilities*, 35 FCC2d 844, 853-854 (1972). To a large extent this undercuts the Commission's argument here, *see* note 39 *supra*, that it conferred a statutory monopoly on AT&T in this field.

[64] *See Specialized Common Carrier Services*, *supra* note 26, 29 FCC2d at 920 (¶ 103) ("In light of all of the foregoing and the record as a whole, we adopt our staff's analysis * * * as amplified and modified herein."). There is no indication that the Commission "modified" the staff's analysis of the points relevant to this appeal.

[65] *Specialized Common Carrier Services*, *supra* note 26, 29 FCC2d at 886 (emphasis added).

> The results of any authorizations would be the object of close and continuous scrutiny by the Commission. Should adverse consequences develop or appear imminent, the Commission can take such remedial action or precautionary measures as may be necessary to protect the public. *As indicated, appropriate action can be taken in connection with the tariffs.* In addition, any renewal of license for the proposed facilities would require a public interest finding and could be subject to any needed conditions. Moreover, the Commission's broad rule making powers are always available. * * * [66]

The undeniable import of the staff's analysis is that questions related to the future impact of specialized carrier service offerings other than those immediately at hand in the *Specialized Common Carrier* case should be resolved in other proceedings—in tariff proceedings, upon license renewal, or by further rulemaking. Strikingly absent from this list is a mention of further Section 214 proceedings.

For the reasons stated above the Commission's *Specialized Common Carrier* decision cannot reasonably be read to have made an affirmative determination that the public convenience and necessity required "private line" restrictions on the facilities authorizations of specialized common carriers.[67] Instead, it appears that the Commission saw benefits accruing to the public from the services which were before it. In granting the facilities authorizations on the basis of that public interest finding, the Commission did not perhaps intend to open the field of common carrier communications generally, but its constant stress on the fact that specialized carriers would provide new, innovative, and hitherto unheard-of com-

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[66] *Id.* at 887 (emphasis added).

[67] For this reason the deference normally owed to our agency's interpretation of its own decisions, *see, e.g., Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), is not appropriate here. *See id.* at 18.

munications services clearly indicates that it had no very clear idea of precisely how far or to what services the field should be opened.[68] As indicated in the staff report, a decision was apparently made to consider the consequences of future developments in appropriate future proceedings. There being no affirmative determination of public interest need for restrictions, MCI's facility authorizations are not restricted and therefore its tariff applications could not properly be rejected.

D.

As a final and somewhat collateral point, we are concerned with a thread running through the Comission's analysis—that the *Specialized Carrier* decision granted AT&T a *de jure* monopoly over MTS and WATS service which would be undermined were MCI allowed to provide Execunet—because any such assertion is plainly incorrect and may have influenced the Commission's disposition of the instant case.

As the Commission staff explained in *Specialized Carriers*, absence of competition in the "general domestic common carrier service field * * * is due primarily to the fact that until the filing of [MCI's first Section 214 applications] the Commission had no occasion to consider applications for competitive service in this area." [69] The question whether AT&T should be granted a *de jure* monopoly was not among those proposed to be decided in *Specialized Carriers*, and nowhere in that decision can justification be found for continuing or propagating a monopoly that, according to the staff, had theretofore

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[68] *See Specialized Common Carrier Services, supra* note 26, 29 FCC2d at 905-914 (¶¶ 65-86). Indeed, to the extent that any definition of a specialized common carrier emerges from the Commission's discussion, that definition appears to be simply that a specialized carrier is any carrier that does not attempt to optimize its service offerings to the voice communications needs of the general public. *See id.* at 882 (¶ 29); *id.* at 906-907 (¶¶ 69-70).

[69] *Id.* at 881.

just grown like Topsy. Of course, there may be very good reasons for according AT&T *de jure* freedom from competition in certain fields; however, one such reason is not simply that AT&T got there first. Indeed, the Commission's attempt here to imbue AT&T's existence with public interest significance represents a retrenchment from the position it took in passing on a proposal to enter the MTS field via domestic communications satellites: "[W]e should not reject any proposal that might prove feasible and beneficial to the public simply because it represents some departure from the established scheme." *Domestic Communications-Satellite Facilities*, 35 FCC2d 844, 854 (1972).

Because the Commission has not so far determined that the public interest would be served by creating an AT&T monopoly in the interstate MTS field, it may not properly draw any inferences about the public interest from the bare fact that another carrier's proposed services would compete in that field.

## III. Conclusion

We have today decided that the Commission erred in rejecting MCI's Execunet tariff as unauthorized. The Commission has no general authority to insist that carriers receive its approval before filing tariffs proposing new services or rates. Only if the Commission has determined that the public convenience and necessity may require that new services receive advance approval can it then reject a tariff as unauthorized. In so holding we have not had to consider, and have not considered, whether competition like that posed by Execunet is in the public interest. That will be the question for the Commission to decide should it elect to continue these proceedings. In that eventuality the Commission must be ever mindful that, just as it is not free to create competition for com-

petition's sake,[70] it is not free to propagate monopoly for monopoly's sake. The ultimate test of industry structure in the communications common carrier field must be the public interest, not the private financial interests of those who have until now enjoyed the fruits of *de facto* monopoly.[71]

*Reversed and remanded.*

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[70] *See FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 96-97 (1953); *Hawaiian Telephone Co.* v. *FCC*, 498 F.2d 771, 776-777 (D.C. Cir. 1974).

[71] *Cf., e.g., Carroll Broadcasting Co.* v. *FCC*, 258 F.2d 440, 443 (D.C. Cir. 1958).

APPENDIX B

F.C.C. 76-622

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Docket No. 20640

IN THE MATTER OF
MCI TELECOMMUNICATIONS CORPORATION

Investigation into the lawfulness of Tariff FCC No. 1 insofar as it purports to offer Execunet service

DECISION

(Adopted: June 30, 1976; Released: July 13, 1976)

BY THE COMMISSION: *CHAIRMAN WILEY NOT PARTICIPATING; COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. This matter is before us on grant of a Motion To Hold in Abeyance we filed before the United States Court of Appeals for the District of Columbia in the case of *MCI Telecommunications Corporation* v. *FCC*, Case No. 75-1635. That case involves MCI's appeal of an earlier Commission Order, FCC 75-799, adopted July 2, 1975, which found Execunet to be essentially message telecommunications service (MTS) rather than private line service. Since we found therein that MCI Telecommunications Corporation (MCI) was authorized to offer only private line service, we rejected the tariff for Execunet and ordered MCI to cease offering the service within thirty days. The D.C. Circuit granted MCI a stay of that order.

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* Commissioner Hooks issued a concurring statement to our *Memorandum Opinion and Order* released May 17, 1976, FCC 76-442, in which Commissioner Robinson joined. This statement is attached to this Decision.

2. In granting our motion to hold the appeal in abeyance, the Court remanded the case upon our representation that we would consider certain arguments made by MCI on appeal which had been mentioned only briefly before the Commission. Accordingly, we instituted the present proceeding by Memorandum Opinion and Order released December 3, 1975, 57 FCC 2d 271. Because the facts of this case were essentially not in dispute, and in view of the Court's order, to expedite the proceeding, the procedures employed included two rounds of comments from all interested persons, and oral argument. Comments and reply comments were filed by MCI, American Telephone and Telegraph Company (AT&T), American Satellite Corporation (ASC), Southern Pacific Communication Corporation (SPCC), GTE Service Corporation (GTE), United States Independent Telephone Association (USITA), Continental Telephone Company (Continental), and RCA Global Communications, Inc., as trustee (RCA Globcom). Oral argument was held on May 24, 1976.

*Background*

A. *July 2nd Order and Appeal*

3. In our July 2, 1975 Order we rejected MCI Telecommunication Corporation's Tariff FCC No. 1 insofar as it purported to offer Execunet service, upon our finding that contrary to MCI's assertion, Execunet was not in fact a private line service, and that MCI had not received a prior authorization to offer any service other than a private line service.[1]

[1] Execunet's characteristics are summarized as follows. A customer in the calling city calls the local MCI office via local exchange telephone service from any push-button telephone in the local exchange area. A rotary-dial telephone can also be used if the caller has a touch-tone pad (tone generator). This device can be purchased in the open market from numerous sources. He then pulses his customer code and the area code and calling number of any telephone in one of a number of distant cities. Connection at the distant end may again be accomplished via the local exchange telephone service in that area. Upon connection, the customer is charged a per-

4. We found on the basis of MCI's own description of Execunet in its letter to the Chief, Common Carrier Bureau, dated June 5, 1975 (see Appendix B) especially paragraph 4, that Execunet, like MTS, had the following characteristics:

(1) ". . . the intercity facilities used for Execunet are shared by all users of the service . . ."
(2) ". . . Execunet can be accessed directly from any push-button telephone (or from any telephone, using a separate tone generator) in the calling city to call any telephone in any one of a number of distant cities . . ."
(3) ". . . the Execunet customer uses common local exchange plant at both ends . . .", and
(4) ". . . the Execunet customer is billed for each call, based upon time and distance, subject to a monthly minimum, with no charge added at the distant city . . ."

5. We concluded that these were basic similarities to MTS, the combination of which "under the factual situation presented here, inescapably leads the Commission to conclude that . . . Execunet service is essentially a switched public message telephone service, rather than private line."

6. We then examined our policy as expressed in our *Specialized Carrier Decision* in Docket No. 18920, 29 FCC 2d 870 (1971), as well as the conditions we had placed upon MCI's facility authorizations. Based upon MCI's description of Execunet, our specialized carrier policy and the restrictions we had placed on MCI's au-

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minute toll, based upon the mileage to the city called, subject to a connection charge and a monthly minimum charge. Any MCI Execunet customer in the calling city can access the system at any time to place a call, and presumably many such customers may utilize the intercity facilities simultaneously. In other words, none of the MCI plant, or indeed any of the plant used in completing the call, is dedicated to the use of a particular customer during any specified time; rather it is available upon demand.

thorizations, we concluded that MCI was authorized to offer only private line service, not MTS, and therefore that this offering was unlawful on its face. We then rejected the tariff, citing *Press Wireless, Inc.* v. *FCC*, 264 F.2d 372 (D.C. Cir., 1959), and allowed MCI a thirty day period in which to discontinue service, so that MCI's customers could arrange for alternative service.

7. MCI petitioned the United States Court of Appeals for the District of Columbia for review of our Order. In its Stay motion, MCI argued that our action in the Execunet proceeding violated basic concepts of fundamental fairness by failing to accord MCI (1) sufficient notice of an investigation concerning its Execunet service, (2) any opportunity for a hearing respecting the facts of the service or (3) any notice that we might take action without instituting formal proceedings, and (4) that the occurrence of *ex parte* presentations by representatives of AT&T about the nature of Execunet obligated us to hold an evidentiary hearing to allow MCI to set the record straight. In addition, MCI argued that Docket No. 19117 had modified the specialized common carrier policy in a manner to permit MCI to provide *any* common carrier service merely by filing a tariff revision.

8. In Court, MCI claimed that the principal issue in the Execunet proceeding was that we had ordered MCI to discontinue Execunet service without notice and without opportunity for hearing. MCI also contended that it had not been informed of the full extent of AT&T's off-the-record arguments against Execunet. Without that information, it was deprived, it claimed, of any opportunity to meet those arguments and, in turn, to present rebuttal evidence. AT&T's presentations, MCI contended, constituted a systematic lobbying effort which effectively predetermined the proceeding's outcome and deprived MCI of due process. Finally, MCI argued that we had a duty to notify it of the pending adverse action and to supply a summary of the factual basis for the action, before ordering the discontinuance of Execunet.

9. Since some of these arguments had not been fully put before us and thus not fully addressed, we requested the Court to remand the proceeding in order to allow us to review these arguments thoroughly. The Court granted the motion and directed that further proceedings "be conducted and concluded expeditiously." See *MCI Telecommunication Corporation* v. *FCC, supra.* Consistent with the Court's order, we called upon MCI and other interested parties to file comments and reply comments regarding the lawfulness of MCI's offering of Execunet service.

10. On December 15, 1975, MCI filed a series of motions including a motion to modify procedures, a motion for initiation and conduct of a special evidentiary hearing to look at AT&T's allegedly improper contacts with the Commission, a motion to take the deposition of a certain AT&T employee, a motion to preserve evidence, and a request for admission of fact by the Commission. In a Memorandum Opinion and Order, FCC 76-31, released January 23, 1976, we dismissed as moot MCI's motion to preserve evidence since AT&T had stated it would preserve all relevant information in its possession. In addition, we stated we would act on MCI's other motions in a timely fashion and in accordance with due process.

11. We determined that prior to ruling on these motions the best procedure was to schedule oral argument. In *MCI Telecommunications Corporation*, 58 FCC 2d 962, released March 26, 1976, we asked parties participating in the oral argument to be prepared to discuss, *inter alia*, the following issues:

a. What class or classes of service is MCI permitted to offer pursuant to its facility authorizations and Commission policies?
b. What changes, if any, were made to the permitted classes of service by our Report and Order in Docket No. 19117, 39 FCC 2d 131 (1973)?
c. Is Execunet service, as presently offered, a private line service?

d. Were any communications between parties to this proceeding and the Commission, as developed by filings herein, in violation of any applicable statute or regulation?
e. If any prohibited contacts occurred, what effects have they had on the substance of this proceeding?
f. Whether any further proceedings are required to comport with the requirements of due process of law.

MCI then filed motions requesting an evidentiary hearing on certain specified "disputed questions of fact." It sought a hearing to determine the accuracy of our statement that the staff had raised questions about the lawfulness of MCI's metered use tariff prior to the AT&T contacts and pleadings. MCI also renewed its motion for an evidentiary hearing concerning AT&T's presentation and asked that the oral argument be held in abeyance pending the outcome of the proceedings it had requested. By an Order, released May 17, 1976, we stated that we would determine whether further proceedings were warranted at the conclusion of the oral argument. On May 20, 1976, MCI filed a "Memorandum for Oral Argument" restating its contention that an evidentiary hearing concerning AT&T's presentations was necessary prior to the May 24, 1976 oral argument. Also on May 20, 1976, MCI filed a "Motion for Inquiry Into the Public Interest Consideration Regarding Establishment of a Communications Monopoly" asking that we begin an inquiry concerning whether a need for an MTS monopoly exists and, if so, the outer boundaries of that service offering.

B. *Events Prior to Execunet Order*

12. A full understanding of this proceeding requires a review of the events and filings leading to our July 2 rejection of the Execunet offering. The following narrative is drawn from the pleadings and affidavits filed by MCI and AT&T with the Court and with us.

13. In early September, 1974, MCI initiated a meeting with the Bureau staff to explain a proposed metered use service to be instituted by a tariff revision. The metered use service would make possible payment of charges by private line subscribers on a time and distance sensitive basis. The conversations with the staff served mainly to alert the staff that MCI would file within a short time tariff modifications effecting the metered use service and other private line communications features MCI considered innovative. Following the filing of the tariff revision, there were a series of meetings between the staff and MCI's representatives concerning the meaning of metered use service and other tariff matters. At this point the term Execunet was not used and the tariff did not describe the scope of services that MCI intended to provide. MCI, however, filed an amendment to clarify the meaning of its tariff. This amendment explained how metered service would use local business telephone lines and private lines to access exchanges in distant cities. According to the amendment, when a number of customers shared a local business telephone line, MCI would prorate the monthly charge. The tariff did not indicate that the sharing would involve an unlimited number of unspecified customers, i.e., all subscribers to a particular service. To help clarify the meaning of its tariff, the staff requested MCI to file a glossary of complete and clear definitions of the terms in its tariff. MCI promised to do so and the revisions became effective pursuant to law on October 10, 1974.

14. The staff and MCI met again in November to discuss the filing by MCI of a glossary defining terms used in the tariff filings and also the services contained in marketing brochures. A third meeting was held in December concerning the glossary MCI had promised to provide. At this time representatives of MCI explained that some additional time was still necessary to provide the glossary since the tariff was organized on a modular framework, rather than in terms of marketing packages

offered to customers. According to MCI, this approach allowed it to tailor services to a particular customer's needs. However, MCI stated that to retain this flexibility each functional component must be set forth separately in the tariff, thus making it difficult to set forth clearly the various service arrangements possible under the tariff. According to an MCI affidavit dated July 3, 1975 and filed with the Court, MCI also indicated at that meeting, or shortly thereafter, that it would begin marketing the Execunet service in January 1975, and agreed that "Execunet" would be included in the glossary when it was prepared.

15. According to an affidavit filed with us, AT&T became aware in late October, 1974, that MCI was ordering a substantial number of local exchange lines, MCI had informed AT&T's local operating companies that it intended to use those local exchange lines in conjunction with its newly instituted metered use service. After apparently attempting without success to clarify MCI's meaning of metered use service, AT&T by letter dated November 6, 1974, requested MCI to respond to several questions regarding the scope of tariff revision. AT&T alleged that the tariff material was inadequate for a determination of whether use of the local exchange service by MCI violated resale restrictions in AT&T's private line tariff, FCC No. 260. In reply MCI requested tariff information from AT&T, to which AT&T responded by letter on December 3, 1974. AT&T states that it provided MCI with the information it sought and again asked MCI to provide the Metered Use Service clarifications it had earlier requested. According to AT&T, MCI never responded. (The exchange of correspondence is contained in an attachment to an affidavit filed with us on December 29, 1975).

16. By January, 1975, MCI was offering Execunet service to the public. MCI states that at that time it informally provided Execunet marketing brochures to Commission personnel. AT&T states in its December 29,

1975 affidavit that it did not become aware of the Execunet offering until March, 1975, when Execunet marketing brochures were brought to its attention. Subsequently, by subscribing to the service through an intermediary it determined the nature and characteristics of Execunet.

17. As a result AT&T concluded that MCI was illegally providing Execunet. AT&T then orally informed various Commission personnel of its beliefs and the reasons for them. AT&T, in its affidavit, dated December 29, 1975, filed with us, states that in describing the service to Commission personnel, it relied on Execunet marketing brochures, a transmittal letter from MCI to prospective Execunet customers and copies of the AT&T and MCI correspondence concerning AT&T's request for clarifications of the meaning of metered use service. AT&T also acknowledges that it demonstrated the service from telephones with the occasional aid of a touch tone pad. According to AT&T's affidavit, no other materials were used in its presentations. In the course of its conversations, AT&T urged the Commission personnel to take action to stop what it considered an unlawful service. Without in any way indicating what action we might take on our own motion, the Bureau staff reminded AT&T that there were both formal and informal complaint procedures which it could follow. Accordingly, AT&T filed a complaint on May 19, 1975 requesting the Commission to take action against Execunet. AT&T states in its affidavit that it ceased discussing Execunet service with the Commission on May 15, four days before it filed its informal complaint.

18. On May 21, 1975, the Common Carrier Bureau referred a copy of the AT&T letter to MCI. The cover letter stated that AT&T had alleged that "Execunet service is not properly tariffed with this Commission, and that the service constitutes the provision of long distance message telephone service which MCI is not authorized to provide." The Bureau then requested MCI to comment on AT&T's allegations.

19. On June 5, 1975, MCI replied stating that Execunet is a private line service comparable to other private line offerings, and that the tariff contained a description of all the components necessary to offer and provide the service and determine charges. In addition, MCI described in detail the fundamental characteristics of Execunet.

20. On June 9, 1975, MCI filed a letter stating that while its letter of June 5 had "competently and completely" answered AT&T's objections about Execunet service, it was concerned about the staff's handling of AT&T's written allegations as well as about the matter of "lobbying" at the Commission. MCI claimed that AT&T had used "sophisticated presentation techniques . . . to spur some members of the Commission's staff to pre-judge the matter before MCI had had even the chance to present its side of the story." It stated that it "was not requesting a hearing on this matter." Instead it asked for "equal time" with those persons to whom AT&T had presented its argument.[2] MCI proposed that we initiate an investigation including an immediate request for the names of the AT&T personnel who participated in the lobbying, the identification of the personnel to whom AT&T's views were presented, the date and length of those conversations, what brochures or other material were used, the substance of the oral presentations made, and other information. At the conclusion of the proposed investigations, MCI asked that this information be made available to it along with an opportunity to rebut AT&T's arguments.

21. On June 13, 1975, AT&T replied to MCI's assertion that "Execunet is a private line service." In addition to submitting an analysis of the differences between

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[2] It should be noted that it is common for members of the public and carriers to orally bring their complaints to the attention of the Commission. MCI, itself, has made such presentations. This practice was implicitly recognized by MCI and formed the basis for its request for "equal time."

private line services and Execunet, AT&T attacked MCI's "lack of candor" in submitting "confusing and inadequate" tariff materials and its failure to supply any of the facts requested by AT&T relating to Execunet. Despite MCI's assertion that its service components were set forth in its tariff in a modular framework, AT&T claimed it had been unable to put together the individual tariff components so as to describe Execunet service.

22. On June 16, 1975, the Chief, Common Carrier Bureau responded to MCI's protest of June 9 about the manner and depth of AT&T's off-the-record presentations. The letter reminded MCI of the staff's initial view that its tariff revisions filed in September were in need of clarification and MCI's "standing commitment" to file an administrative tariff containing a clear explanation of the tariff terms and descriptions. After MCI's lengthy delay in filing that information, first requested nine months earlier in September 1974, the Chief, Common Carrier Bureau stated he did not consider a requirement for the prompt exchange of correspondence unusual. He added that AT&T's letter "merely highlighted" an important problem already recognized by members of the staff. In conclusion, he stated that the Bureau was of the opinion that conversations between a member of the Commission or staff with a carrier does not automatically entitle another carrier with an opposing viewpoint to "equal time."

23. MCI filed a third letter on July 1, 1975. The letter stressed MCI's concern that we might act on Execunet in the near future without having heard both sides of the case. While stating that "[i]t agrees informal communications are highly desirable and indeed necessary to the functioning of an administrative agency like the Commission," MCI reiterated its objections to AT&T's presentations. MCI perceived these contacts to be "a very extensive off-the-record presentation of AT&T's position to key Commission personnel at a time when AT&T must have known that, if the agency could not be moved to act on its

own motion, the Company planned to file a complaint about the matter." MCI requested that any action concerning Execunet await a further filing containing a point by point rebuttal of AT&T's on-the-record arguments. MCI then argued for the first time that our action in Docket No. 19117 broadened MCI's authorization to provide common carrier service beyond the specific limitations of the specialized common carrier policy. Taking into consideration all the arguments before us, we adopted an Order directing MCI to discontinue Execunet service. As is evident from the order itself, our decision was based only on the materials filed with us by AT&T and MCI.

C. *Substantive Arguments*

24. This section summarizes the parties' position as to the lawfulness of MCI's offering of Execunet service and our right summarily to reject MCI's tariff. MCI puts forth six principal alleged errors in the July 2 Order which rejected the service offering and asserts the following counter arguments under which the service would be lawfully offered:

(a) *Execunet is within the class of service which MCI is authorized to offer.* The *Specialized Common Carrier* decision, *supra*, permitted competition for "specialized" and "innovative" services and did not limit competitors to the private line field. Even if that decision did limit the competitors, the Commission's Report and Order in *Establishment of Rules Pertaining to the Authorization of New or Revised Classifications of Communications on Interstate or Foreign Common Carrier Facilities*, Docket No. 19117, 39 FCC 2d 131 (1973) removed all restrictions which appeared in the *Specialized Common Carrier* decision and domestic facility authorizations as to the types of services which could be offered

using those facilities. Accordingly, a carrier need not obtain prior Commission authorization of new services.

(b) *Section 21.705 of the Commission's Rules permits a carrier to introduce new services by filing a tariff revision.* That section reads in part: "Stations in the [domestic public radio] service are authorized to render any kind of communication service provided for in the legally applicable tariffs of the carrier, unless otherwise directed in the applicable instrument of authorization . . ." Since Docket 19117 removed all restrictive conditions on MCI's authorizations, this section permits MCI to offer any new service which uses existing facilities through the filing of a tariff revision.

(c) *The Commission does not have the authority summarily to reject a tariff unless it is "so patently a nullity as a matter of substance law, that administrative efficiency and justice are furthered by obviating any docket at the threshold rather than opening a futile docket." Municipal Light Boards* v. *FPC*, 450 F.2d 1341, 1346 (D.C. Cir., 1971). Since this filing is not unlawful on its face, the Commission can examine it only through a hearing initiated pursuant to Sections 204 and 205 of the Act.

(d) *Execunet is an entirely new service offering, not MTS, which has characteristics essentially similar to those of private line service.* However, Execunet cannot be characterized in either classification since it is an entirely new communications service.

(e) *The Commission has never determined that AT&T should have a monopoly over interstate MTS.* Therefore, even if Execunet were characterized as MTS, MCI could lawfully offer in it competition to Bell.

(f) *Since Execunet is a new, innovative communications service, which subscribers find meets an otherwise unmet need, the public interest would not be served by discontinuing the service.*

25. MCI also supplied a number of affidavits from company officials, Execunet subscribers and from William H. Melody, economic consultant. The subscribers essentially assert the importance of Execunet to them and the otherwise unfulfilled communications requirements which the service provides. Melody avers that the projected revenue shift from the Bell System as a result of Execunet ($37 million) is minor and will have little or no impact on Bell's ability to continue to provide high quality communications service.

26. The other attachments to MCI's comments consist of lengthy affidavits from Bert C. Roberts, Jr., Vice President, and William G. McGowan, President and Chief Executive Officer of MCI. These affidavits expand upon certain of the substantive allegations made in MCI's comments. Mr. Roberts lists what he contends to be the differences between Execunet and MTS and the similarities between Execunet and private line services. These will be discussed *infra*. He also enumerates five alleged errors in the discussion of similarities between Execunet and MTS which appeared in our July 2 Order. These are:

(a) ". . . both use nondedicated local and intercity facilities . . ." Mr. Roberts characterizes the intercity lines used for Execunet as dedicated to users of this service and not used by subscribers to any other MCI service. In addition, he contends that the local business lines subscribed to by MCI are likewise dedicated to Execunet customers' use. Finally, customers have the option of subscribing to a dedicated local loop for use in connection with this service.

(b) ". . . both are accessible on demand by any customer . . ." While MTS can be used by any per-

son anywhere in the country, with no minimum volume required, Mr. Roberts describes Execunet service as limited to fifteen cities, accessible only by its customers, subject to a $75 per month minimum charge, and accessible only from push-button telephones. He also notes that, while MTS is marketed to the general public, Execunet is intended for only that class of users with at least $75 in monthly toll charges to the cities which Execunet serves.

(c) ". . . both charge on a per call basis . . ." While MTS is charged only on a per-call basis, Mr. Roberts notes that Execunet is subject to a $75 per month minimum, can be subscribed to only for a minimum period of a month, can be cancelled only on a thirty days' notice, is not subject to peak/off-peak pricing, and is charged on the basis of total minutes of connect time to a given distant city per month. Finally, the subscriber to Execunet must pay a prorated share of the local termination charge.

(d) ". . . both are available from any telephone in the calling city (Execunet is subject to the push-button telephone limitation, but this is caused only by technical limitations) . . ." Mr. Roberts points to the fact that Execunet is accessible only within certain (currently 15) cities, while MTS is available everywhere, and he asserts that the push-button telephone restriction is a more significant difference than the Commission's Order implies.

(e) ". . . and both may be used to call any telephone in one of a number of distant points." While MTS is available to call any telephone in the country, Mr. Roberts asserts that the limitation of Execunet to 15 cities is a difference in kind rather than degree between the two services.

27. Finally, Mr. McGowan reiterates that Execunet, which he characterizes as shared private line service, is a separate class of service from those services offered by other carriers, and that MCI has proposed the sharing of private line channels as early as 1969. He further claims that our Execunet decision is a step back from full and fair competition, and that the real issue is whether AT&T may impose its definition, "through the FCC," of what the competitors may offer "in order that these competitors may eventually be squeezed out of business."

28. AT&T disputes MCI's contentions and asserts that we should reaffirm its July 2 Order. Bell's principal arguments can be divided into three points:

(a) *Commission policy precluded competitive entry into the MTS business.* Both the conditions placed on MCI's Section 214 authorizations and the policies established in the *Specialized Common Carrier* decision, *supra*, make this policy evident. The Commission has made very clear its view of MTS as a monopoly service, and departure from this policy would undermine AT&T's services and destroy the nationwide MTS price averaging structure. MCI has proposed in Docket No. 18920 that it would offer only customized point-to-point services and never stated that it would seek to compete with Bell in providing local exchange or long distance toll telephone service.

(b) *MCI has never sought or obtained Commission authorization to offer services other than those which are consistent with the policies established in the Specialized Common Carrier decision, i.e., private line services.* Without a formal application it cannot offer other services, since the Commission has never permitted competition in the MTS business.

(c) *Execunet is not a private line service.* Rather, it has the fundamental characteristics of mes-

sage toll service: it is a service among many points on an exchange basis, facilities are used in common with other Execunet subscribers, a new switching connection is required for each call and it is charged on per-call usage-sensitive basis. By contrast, private line is a service between designated points facilities are designated for the use of a single subscriber, a new connection does not have to be made for each call and charges are made on a fixed, periodic basis.

29. Both ASC and SPCC recognize the possible broad applicability of this decision and therefore ask us to confine our decision as narrowly as possible—if we should find Execunet unlawful—in order not to rule out any proper innovative services currently being planned. RCA expresses the same concern but further asserts that our policy does not limit the SCCs to private line services but merely requires that they offer "specialized communications services."

30. GTE, USITA and Continental agree with AT&T that Execunet has most of the characteristics of MTS station-to-station direct dial service. They assert that Execunet is not a private line service (specifying alleged differences), and that it cannot be compared to foreign exchange (FX) service. Since MCI's facility authorizations and our policies allegedly limit MCI to private line services, including FX, they claim that MCI is not authorized to offer Execunet service, and that we should reaffirm its rejection.

31. In reply, MCI alleges that we did not intend to limit the SCC's to private line services but rather spoke in terms of "customized services" and "specialized communications" in Dockets 18920 and 19117. MCI also disputes AT&T characterization of Execunet and claims that it is a private line service which falls within MCI's broad authorizations, not functionally similar to MTS. AT&T and USITA, in reply, dispute MCI's position and express views similar to those in their initial comments.

D. *Substantive Analysis*

32. Determination of the lawfulness of MCI's Execunet offering is dependent upon three basic issues:

(a) Are MCI's authorizations, based upon policies established in Docket No. 18920, limited to the offering of private line services, or if not, is MCI otherwise limited in the services it may offer?
(b) If the above limitations existed, were they modified as a result of our Report and Order in Docket No. 19117 and Section 21.705 of our Rules?
(c) If MCI is limited to private line services, is Execunet a private line service?

a. *Facility Authorizations and Docket 18920*

33. Our July 2 Order (pages 2-3) quoted language from a number of MCI facility authorizations as limiting the use of the facilities to services which are "essentially private line for the transmission of data, facsimile, control, remote metering, voice and other communications." This language was taken from MCI's applications and, as will be seen, is similar to MCI's description of its own services in proceedings both before us and before the courts. As MCI points out, however, not all of its authorizations contain similar language, some contain no such restrictions, and thus it is necessary to look further, to our expressed policies, and to judicial statements, to ascertain the limits on SCC services.

34. The foremost pronouncement of our policy regarding the role of Specialized Common Carriers in domestic communications is the *First Report and Order* in Docket 18920, *supra* (the *Specialized Common Carrier* decision). We have never modified this policy, but rather have re-

affirmed our findings therein on several occasions,[3] and therefore they are controlling on the issues in the case.

35. At the time of the *Specialized Common Carrier* decision, we had before us 1713 microwave applications from 33 applicants, 17 of which were affiliated with MCI. Accordingly, the statements of MCI as to the types of services it proposed to offer were of importance in the policy determination made therein and are helpful in ascertaining the limits, if any, imposed upon Specialized Common Carrier (SCC) service offerings. The MCI applications considered were for "portions of a proposed nationwide network to provide specialized *private line* communications services" (emphasis added) 29 FCC 2d at 874. We further quoted MCI's pleadings that "the real distinction which delineates MCI service from anything provided today by existing common carriers is not the facility itself but the manner in which a customer may utilize it in order to provide a customized intra-company point-to-point communications system of his own design and capability" 29 FCC 2d at 875. Finally MCI asserted that there was a distinct difference between a public telephone service which is a natural monopoly and a customized communications service offered on a private line basis, *Id.* Thus, MCI sought therein to offer only private line, point-to-point services. Later, in discussing the impact of the specialized services being proposed upon existing carriers, we indicated (29 FCC 2d at 907):

> MCI's proposed "customized" or "individually tailored" private line services purport to offer customers the flexibility and benefits of private microwave at lower cost to the user, *e.g.*, the exact bandwidth required for any particular service, any bandwidth that is required, and flexibility in the use of channels and customer terminal equipment.

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[3] See, *e.g.*, Docket No. 19117, 39 FCC 2d 131, 133; *AT&T* (Hi-Lo), 58 FCC 2d 362, 366 (1976); *Bell System Tariff Offerings*, 46 FCC 2d 413, 424-25 (1974).

36. Our discussion in the *Specialized Common Carrier* decision makes it quite clear that we intended and did open competition only in the limited portion of AT&T's and Western Union's business represented by private line services. For example, our analysis of possible revenue diversion (29 FCC 2d at 911-914) dealt only with the private line revenues of these two carriers. Further, we recognized that SCCs would not compete directly with the established carriers' message services.

> "There is no reason to believe that [nationwide average] pricing of the interstate message service offerings of the Bell System and Western Union (such as MTT, WATS, and public telegraph) need be altered by new entry into the developing specialized communications market. Clearly, none of the uniform rate structures of the existing carriers for such services would appear in jeopardy *since those services are not being challenged competitively to any substantial degree by the services proposed to be offered by the aspiring new entrants.*" 29 FCC 2d at 915 (emphasis added)

37. The Report and Order in Docket No. 18920 speaks both in terms of specialized and private line services. Although MCI and RCA Globcom contend herein that the term "specialized services" includes far more than just "private line," a reasonable and proper reading of our language equates the two. For example, in describing the applicants' proposed services, we characterize MCI's proposals as " 'customized' or 'individually tailored' private line service," while the subsequent discussion refers collectively to such proposals as "specialized services." 29 FCC 2d at 907. Finally, the market studies referred to therein all surveyed the potential demand for specialized private line services, and thus our estimates of the impact of the SCCs were predicated on direct competition for private line services only.

38. In a similar vein, we dealt with the contention that the new entrants would merely be duplicating the services then being offered by established carriers (29 FCC 2d at 906):

> While there may be some overlap between the services proposed by the applicants and the present offerings of the established carriers, we find sufficient warrant for the staff's conclusion that the applicants are seeking primarily to develop new services and markets, as well as to tap latent, but undeveloped submarkets for existing services, so that the effect of new entry may well be to expand the size of the total communications markets. To be sure, the established carriers now provide data transmission and private line services. However, the services proposed by the applicants have technical and service features significantly different from those of the established carriers.

39. This intention to limit SCC services to private line offerings was also recognized by the United States Court of Appeals for the Ninth Circuit. In upholding the Commission's *Specialized Common Carrier* decision, *sub nom Washington Utilities and Transportation Commission* v. *FCC*, 513 F.2d 1142, 1159 (1975), *cert. denied*, 423 U.S. 836 (1975), the Court stated:

> The business involved is that of providing *specialized private or leased line communications services* through microwave transmission facilities, *as distinguished from public exchange and long distance toll telephone service.* [emphasis added]

40. Similarly, the United States Court of Appeals for the Third Circuit, in upholding the Commission's Decision in *Bell System Tariff Offerings*, Docket No. 19896, 46 FCC 2d 413 (1974), interpreted the *Specialized Common Carrier* decision as referring only to competition in private line services. *Bell Telephone Company of Pennsylvania* v. *FCC*, 503 F.2d 1250, 1260-1261 (1974):

> [W]e note that in assessing the extent to which the established carriers' revenues might be diverted by competition from the specialized carriers, the FCC focused upon the *total* revenues earned by the established carriers in private line services. We find this focus to be significant. Implicit in the FCC's evaluation is the assumption that the new entrants will provide services similar to those provided by the established carriers within the rubric of "private line services." [emphasis in the original, footnote deleted].

41. Finally, MCI itself, in pleadings before the United States Supreme Court,[4] and the District of Columbia Circuit[5] and the Third Circuit[6] U.S. Courts of Appeals, interpreted the Docket 18920 Report and Order as limiting SCCs to the offering of private line services. (Relevant portions of these briefs appear in Appendix C.) For example, in its Supreme Court brief, *supra* note 4, MCI asserted:

> (3) The Commission's directive that it contemplated "full and fair competition in the specialized field among all carriers, both established and new . . ." indicates that the Commission intended to authorize the new carriers to provide all elements of the private line services then being furnished by the established carriers, rather than an incomplete "package" of private line services. The Commission's finding that the provision of interstate private line service should be on a full, fair and non-discriminatory basis would be meaningless without the provision of the full range of private line services. (503 F.2d at 1261-62, Pet. App. 22a).

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[4] Brief for Respondent, *American Telephone and Telegraph Company* v. *FCC*, No. 74-1229, May, 1975, pp. 24-25.

[5] Brief for Intervenor, *AT&T* v. *FCC*. No. 74-1953, April, 1975, pp. 2 (n. 1), 17-19, 37.

[6] Brief for Intervenors, *Bell Telephone Company of Pennsylvania* v. *FCC*, No. 74-1386, May 28, 1974, pp. 37-40, 52-54.

(4) The narrow interpretation sought by petitioners here would frustrate the basic objectives enunciated in the Docket No. 18920 proceeding, in which the Commission repeatedly used the generic term "private line service," which put AT&T on notice that it would be expected to provide interconnections for the full range of such services. The denial of interconnection facilities for the specialized common carriers similar to those provided to AT&T's "affiliated carrier," the Long Lines Department, would place them at a definite disadvantage in obtaining customers and frustrate the Commission's objectives in authorizing entry by the specialized carriers. (Footnote omitted).

42. MCI also interpreted Docket 18920 as limiting the specialized carriers to private line services in filings before this Commission. For example, in its brief filed in Docket 19896, *supra*, in discussing whether we intended competition to extend to foreign exchange (FX) and common switching arrangement (CCSA) services, MCI asserted that these were private line services within the meaning of the *Specialized Common Carrier* decision (pp. 46-47):

Any other conclusion would completely frustrate the entire purpose of Docket No. 18920 . . . The Commission knew that if the new carriers were ever to become viable and offer innovation services they would need to share the private line market already being serviced by AT&T and Western Union. Since the Order discussed Bell's total private line market and revenues throughout, it is obvious that *everyone* was to be allowed to compete for *every service*—including FX and CCSA. The Commission now has the opportunity to stop once and for all the effort of AT&T to kill competition by setting up protected enclaves within the private line market from which it claims the right to exclude the specialized carriers on the ground that these services were not specifically men-

tioned in the order in Docket No. 18920. [Emphasis in the original].

43. From this language, it is clear that this Commission, the reviewing courts and MCI itself believed SCC competition to be limited to private line services. Further, they felt that the message services of AT&T and Western Union, such as MTS, would not be subject to direct competition. Finally, the Courts, affirming our stated policy of open entry in this field, acted upon the expressed intention of the SCCs that they intended to offer only private line services.

b. *Docket No. 19117 and Section 21.705 of our Rules*

44. MCI makes the argument that our Report and Order in Docket No. 19117, *supra*; removed the restrictive conditions placed on its facility authorizations and permitted the SCCs to offer any communications services within the technical limitations of their facilities. It also asserts that Section 21.705 gives carriers the right to offer any communications service not specifically excluded by their authorization. Since Docket No. 19117 removed all such restrictive conditions, MCI alleges, it is not limited to private line or any other specific category of service.

45. While Section 21.705 expresses the truism that a carrier need not generally file an application for each new service it wishes to offer, it cannot be used to reverse a clearly defined Commission policy. The Rule states that a carrier may provide any service "provided for in the *legally applicable* tariffs of the carrier" (emphasis added). Any tariff which violates a statute or our Rules, Orders, or Policies is unlawful on its face. *Associated Press* v. *FCC*, 448 F.2d 1095 (D.C. Cir., 1971); see also, *Press Wireless, Inc.* v. *FCC*, 264 F.2d 372 (D.C. Cir., 1959); *Nader* v. *FCC*, 520 F.2d 182 (D.C. Cir., 1975). Since, as discussed above, the *Specialized Common Carrier* decision specified that the SCCs shall offer only private line services, any tariff which offers another service is unlawful on its face. Accordingly, such a tariff is not a "legally applicable tariff" within the meaning of Section 21.705. MCI's rather circular argument, that

a tariff which may be otherwise unlawful is made lawful because of 21.705, cannot stand. If a tariff is unlawful because of our policies or orders, it cannot be made lawful by Section 21.705.

46. Similarly, our Report and Order in Docket No. 19117 removed specific conditions which had been imposed in authorizations on the services domestic carriers may offer. MCI asserts that this action removed all restrictions on all such carriers' authorized services, so that no tariff can be rejected as offering unauthorized services. A reading of the Docket 19117 Report and Order shows that this clearly was not our intention. The rulemaking in that Docket was instituted to determine if certain restrictive conditions placed upon facility authorizations of AT&T and the Pioneer-United Telephone Company should be removed. These conditions required the carriers to utilize the authorized facilities only for existing or specified services unless further authorizations were obtained. They were imposed initially "to provide reasonable opportunity for the competitive development of the market for specialized communications services." It was our concern that "this objective could be thwarted by existing carriers who were in a position to institute new offerings for such services simply by filing tariffs, without any prior Commission approval, while at the same time impeding or delaying the entry of new carriers seeking to serve that market by raising various policy objections to the applications of the new entrants for authorization of facilities to provide service." 39 FCC 2d at 133.

47. By the time of the Report and Order, however, we had adopted the *Specialized Common Carrier* decision and the Second Report and Order in Docket No. 16495, *Domestic Satellites*, 35 FCC 2d 844 (1972), which, *inter alia*, opened the domestic satellite field to competition. Because the policy determinations made in these orders negated the need for imposing specific conditions of this type on the authorizations, we terminated the rulemaking and declared such conditions on the authorizations for domestic facilities of all carriers null and void.

48. While the Docket 19117 Order specifically removed these conditions, it did not in any way modify or reverse our policies regarding the types of services the specialized carriers may offer. Rather it was *because* of the Docket 18920 decision, and because of the presence of competition *for certain services*, that 19117 was decided the way it was. Accordingly, MCI's position that the Docket No. 19117 Order removed all restrictions on the services it can offer is entirely without foundation, and MCI remains limited to the offering of private line services.

49. If we had intended to reverse the Specialized Carrier decision, *i.e.*, to allow a specialized carrier to initiate non-private line service simply through the filing of a tariff revision, the Docket No. 19117 proceeding would clearly not have been the proper forum. The Notice of Proposed Rulemaking therein was narrow in scope, not all the active parties to Docket No. 18920 were parties, and the Report and Order focused only on the necessity of retaining conditions placed on certain domestic facility authorizations. Such a proceeding was certainly not a reasonable place to reverse a policy which had been developed less than two years earlier after an extensive investigation. Further, we certainly would have made it explicit that we intended to reverse such a major policy.

50. In addition, there is no indication prior to the present proceeding that MCI interpreted the Report and Order in Docket No. 19117 in such a way as to reverse the *Specialized Carrier* decision. All the statements in MCI pleadings cited above were filed *after* the Docket 19117 Report and Order was released and in no way indicated that MCI believed the *Specialized Carrier* decision to have been modified—no reference was made in those pleadings to Docket No. 19117. As late as May, 1975, MCI told the Supreme Court that it was limited to offering private line services,[7] and no Commission Order since that date has modified that limitation. Even in the

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[7] *AT&T, supra* note 4.

present proceeding, in its Motion for Inquiry into Public Interest Considerations regarding establishment of a communications monopoly, filed on May 20, 1976, MCI refers (at p. 41) to the "limited areas of communications which the Commission has opened to competition." Thus, despite its allegations in pleadings that Docket 19117 and Section 21.705 removed all restrictions on the types of service MCI may offer, its most recent pleading appears to take the opposite position. Finally, in its oral argument before us, in response to a question about whether MCI has always, both before the Commission and the Courts, described its services as private line, counsel responded, "I think the phrase has been used. It's loosely descriptive of what MCI initially proposed to do" (Tr. 97). In fact, MCI, prior to the present proceeding, has always told the Commission that it intended to offer exclusively-private line services.

51. Both the *Washington Utilities* and *Bell Telephone of Pennsylvania* decisions, *supra*, were rendered well after the Docket 19117 Report and Order, and both upheld the view that the SCCs are limited to private line services. Finally, several Commission decisions rendered since 1973 have reaffirmed the Docket 18920 philosophy (supra, note 3). Accordingly, until the present proceeding there was no indication that the Courts, the Commission or even MCI itself felt that the Docket No. 19117 Report and Order, which was decided more than three years ago, modified or reversed the policies established in Docket 18920. MCI is therefore advocating a position completely different from that which it had advocated at every previous opportunity, including in its own applications for grants of operating authority.

c. *Is Execunet a Private Line or Message Telecommunications Service?*

52. The July 2 Order contained an analysis of the characteristics of Execunet. The conclusion reached at

that time was that Execunet was essentially MTS, not a private line service. MCI has contested this conclusion by listing a number of specific alleged differences between Execunet and AT&T's MTS offering, and similarities between Execunet and private line service.

53. Since MCI had asserted, prior to the July 2 Order, that Execunet had most of the characteristics of foreign exchange (FX) private line service, we addressed what we found to be the differences between the two services (Page 4):

> First, FX is specifically excluded from the joint use provision (3.1.5.) of Tariff 260, while the inter-city facilities used for Execunet are shared by all users of the services. Second, FX is available to access one distant exchange area toll free, from the customer's premises in the calling city, while Execunet can be assessed directly from any push-button telephone (or from any telephone, using a separate tone generator) in the calling city to call any telephone in any one of a number of distant cities but always at a toll charge. Third, an FX customer uses dedicated facilities from his location to the distant telephone company exchange office, and these facilities are available at all times, while the Execunet customer uses common local exchange plant at both ends, connected by inter-city facilities which are not dedicated to any specific customer but are shared by a number of customers. Fourth, the FX customer is billed a periodic charge for the FX line, calculated on a mileage basis, plus a monthly local service charge at the distant location, while the Execunet customer is billed for each call, based upon time and distance, subject to a monthly minimum, with no charge added at the distant city.

54. MCI challenges each part of this analysis, then states that Execunet is not identical to FX or any other private line service but is rather an entirely new communications service which is not MTS. It contends that

Execunet is a variation of a hypothetical service which MCI terms "shared FX." Since our *Resale and Shared Use* inquiry, Docket No. 20097, had not determined whether or not FX should or may be resold or shared, MCI asserts that Execunet cannot be found unlawful merely because it is shared FX service.

55. MCI lists a number of alleged similarities between FX (both "shared" and fulltime) and Execunet, as well as alleged differences between MTS and Execunet. These are listed and discussed in detail in Appendix A. In general, most of the items listed as similarities with FX are also characteristics of MTS, WATS, or both,[8] and thus they are by no means unique characteristics of FX or any other private line service. Certain of the listed items represent very minor differences in billing procedures, minimum contract period and time-of-day pricing which are not essential characteristics of basic MTS or WATS offerings and which are clearly insufficient to cause Execunet to be ruled a completely different service from MTS or WATS.

56. By the same token, the specific characteristics of MTS which MCI cites as not present in Execunet are, for the most part, not essential to MTS but are rather convenience features, many added to the tariffs in recent years, which are not elements of the basic station-to-station dial MTS offering. If features such as person-to-person, collect, credit card and conference call services were eliminated from Bell's tariff, the service would still remain MTS, and the large majority of calls placed would be unaffected. Similarly, see-while-you-talk (Picturephone) and 50 kilobit switched services are specialized, add-on services to the MTS network. As the item-by-item analysis in the Appendix demonstrates, the remaining differences cited by MCI either are not factually correct or are so insignificant that they in no way could

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[8] WATS, like MTS, is not subject to competition, pursuant to the *Specialized Common Carrier* decision, 29 FCC 2d at 911.

reasonably be deemed functional distinctions between the services.

57. Rather than "proving" that Execunet is a private line service and functionally different from MTS, as MCI asserts, analysis of MCI's list demonstrates that Execunet has many characteristics similar to those of MTS or WATS and that many of the alleged similarities with private line service are similarities only with a hypothetical service, presently being offered by no carrier, with characteristics shared in common with non-competitive services.

58. Execunet and MTS are both accessible from any telephone in the calling city and can access any telephone in a number of called cities. Both employ the same local exchange telephone network used in common by the general public in order to enter the inter-city segment of the service offering,[9] and both involve the indiscriminate sharing of inter-city facilities by all subscribers. Inter-city facilities for MTS and Execunet are available on demand, and both MTS and Execunet are charged on a usage-sensitive basis. Finally, neither service terminates in specifically designated customer premises or local exchange switching centers.

59. Prior to the present proceeding, there had been no confusion or debate over the meaning of private line service. The Ninth Circuit U.S. Court of Appeals, in upholding the *Specialized Common Carrier* decision (*Washington Utilities, supra*, para. 39) defined private line service by distinguishing it from "public exchange and long distance toll telephone service." 513 F.2d at 1155. This is the crucial distinction. Private line service, in its most

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[9] While the subscriber *may* secure a separated dedicated local loop for this service he need not do so if he subscribes to local exchange telephone service. Counsel for MCI admitted at oral argument that no customer of Execunet has taken a dedicated local loop and anticipated that the great majority of customers would not take such a dedicated channel (Tr. 9).

obvious meaning has the distinction of being private or dedicated, *i.e.*, not provided to the general public.[10]

60. In order that this logical distinction can have any validity in practice, however, that private line service must be provided via facilities which are in some significant respect dedicated to the *private* use of the customer and not used or useable for public communications services. While more than one private line service or customer might properly share the use of any facilities used in providing the service(s), for purposes of efficiency, the use in common of facilities employed for service offerings to the general public does not fit within the concept of a private line service. Similarly, while private line service may properly include service to more than a single distant location, on both a switched and non-switched basis, these locations should be specific and discrete and must be designated by the customer.

61. Taking these factors into consideration, we believe the *sine qua non* of a private line service is that it (a) either originate or terminate at a specific location designated by the customer via a communications channel dedicated to his private use and not used or useable for public communications services; and (b) access only those distant locations (including if appropriate, distant telephone central offices) specifically designated by the customer [11] to meet his private communications needs.

62. While it appears unquestioned that the significant characteristics of a private line service are the dedicated channel and the designated distant termination, it is instructive to test this definition by describing several serv-

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[10] Webster's New World Dictionary, College Edition, defines private (at pp. 1159-1160) as "of, belonging to, or concerning a particular person or group of persons, not common or general; . . . not open to, intended for, or controlled by the public."

[11] This does not preclude the customer from directly accessing more than one distant exchange or premises from a single dedicated local channel provided each such access location is specifically designated by the customer. This does not preclude certain interconnections to other services.

ices which are generally understood to be classed as "private line." By listing only a few such services as we do not in any way wish to stifle the development and offering of innovative private line services by implying that such services are limited to those presently offered.

63. *Point-to-point private line service* is a term which denotes a *dedicated* or private local channel at each end, connecting the customer's premises to the carrier's local central office, and an interexchange channel (IXC) which connects the central offices. At the customer's premises, the local channel is connected with a telephone, private branch exchange (PBX), teletypewriter or other terminal equipment. The local channel at each end is dedicated solely to the private line service.

64. *Foreign Exchange (FX) service* includes a dedicated local channel, as with point-to-point private line, at one end of the service (commonly referred to as the closed end), connected at the carirer's central office with an IXC which terminates in a distant local exchange (the open end).[12] The customer at the closed end has non-toll access into the local exchange served by that distant central office. A telephone number of the distant local exchange is assigned to the FX service so that the FX customer may be accessed in the same manner as if he were situated within that local exchange.

65. *Common Control Switching Arrangement (CCSA) service* consists of a network of private lines, subscribed to by the customer, which are accessed through switches, located at the carrier's central office, via dedicated local lines. These lines terminate on the customer's premises in connections similar to those provided in connection with point-to-point private line service.

66. These typical existing private line services all have certain unifying characteristics which are necessary elements of all private line offerings. These are termination of the service (1) at one end by a local circuit dedicated to the specific private line service and not used or useable

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[12] See *AT&T*, 56 FCC 2d 14, 20 (Note 5) (1975).

for exchange service within the customer's local exchange area, and (2) at the other end at premises designated by the customer or specifically designated local exchanges. Prior to the filing of Execunet, no tariff filing which purported to offer a private line service has contained characteristics which do not fit this definition, and until the present proceeding, all carriers and the Commission have recognized these as essential characteristics of private line services.

67. While a service having some characteristics in common with WATS or MTS could be found to be private line, Execunet has all the essential characteristics of MTS or WATS. Similarly, Execunet does not have the essential characteristics of private line service and thus cannot be so classified. The most significant characteristic of Execunet which causes it to differ from all private line services is the fact that the local channel terminating at the customer's premise is not dedicated to that service but rather is utilized as well for local exchange service. As a result, the customer can directly access the service from any telephone, on or off his premises, (he can call any telephone in any of a number of distant cities), and more than one authorized user of his identification number can use the system simultaneously.

68. MCI further argues, however, that even if Execunet contains many of the characteristics of MTS, the public interest requires that we approve the service, since no other carrier is offering it and a need for this service allegedly exists. Since we conclude that Execunet has all the *essential* characteristics of MTS, and is thus indistinguishable from MTS, this argument is incorrect. But even if it were correct, the effect of accepting it would be to reverse the *Specialized Common Carrier* policy in this proceeding, without conducting the type of extensive investigation carried out in Docket No. 18920. The need for a service such as Execunet, if it existed, is not the only factor which would have to be considered. Rather, the impact on users of other services and other economic, legal and technical issues would have to be explored in a broad

forum. The policies established in Docket 18920 cannot be eroded on an *ad hoc* basis but rather should be re-examined only upon a showing that a need exists for such review.

69. As noted above, MCI asserts that the revenue shift from other cariers to Execunet is minor and will have an insignificant impact on Bell or other established carriers. At the oral argument, however, counsel from USITA and Continental averred that the potential impact of Execunet on their portions of interstate revenues was substantial and could cause increases in local telephone service. Since we have found that Execunet is outside of MCI's authorizations, and since the evidence before us on economic impact is little more than unsupported allegations, we need not reach this question in this proceeding.

E. *Procedural Arguments*

a. *Notice and Hearing Issues*

70. A principal issue MCI raises is whether our July 2nd action accorded MCI the procedural due process to which it was entitled. MCI argues it was denied notice of the investigation and of the impending adverse action, and a fair opportunity to respond to the arguments against Execunet.

71. MCI claims that the Chief, Common Carrier Bureau's referral of AT&T's complaint cannot constitute notice that we had instituted a proceeding with regard to Execunet. MCI points out that the Bureau's cover letter contained only a ten line request that MCI comment on AT&T's complaint. It contained no reference to possible consequences stemming from the referral and no notice that we were now investigating the lawfulness of Execunet service. MCI contends that the referral appeared only to be part of our routine procedure of referring informal complaints for a carrier's comment pursuant to Section 1.716 *et seq.* of the Rules. Under the Rules, MCI asserts informal complaints standing alone are not ripe for dis-

position. Moreover, according to MCI, we never provided it with the notice required by Section 4 of the Administrative Procedure Act. This section provides that a notice of rulemaking set forth a statement of the time, place and nature of a proceeding, reference to the rule proposed, and the terms of substance of the proposed action or a description of the subject and issues involved. In this context MCI also asserts that our action failed to comply with the minimum standards for notice and hearing required by Sections 204 and 205 of the Communications Act. MCI states this requirement is not open to our discretion. On this basis, according to MCI, our rejection of Execunet deprived MCI of its right to a hearing.

72. Finally the July 2 *Order* is alleged to be defective since it contained no disclosure of the commencement or extent of the investigation. MCI acknowledges that the Commission staff met with MCI representatives more than ten times between the filing of its metered use tariff and the adoption of the July 2 Order. However, according to MCI, staff questions concerning the clarity of a tariff revision ranging over many months cannot be equated with notice that a service offered pursuant to that tariff is the subject of an investigation.[13]

73. MCI further argues that we failed to accord it specific notice that the investigation could lead to the rejection of the service. MCI argues that in cases where we are considering summary adverse action, we have a duty to first give notice that such action is contemplated. MCI contends that we provided no warning to MCI that its authority to offer Execunet was in jeopardy and deprived MCI of proper notice of its proposed disposition. According to MCI, we then denied any opportunity for

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[13] We do not find here nor did we find in our July 2 letter that the staff meetings with MCI constituted notice. Those meetings, however, did reflect the staff's concerns about the scope of MCI's tariff. Thus, when AT&T presented its evidence, we were aware that MCI had not provided clarification of its tariff as it had promised. As a result, the meaning of its tariff remained unclear.

redress by rejecting the service out of hand rather than designating formal proceedings pursuant to Section 204 or 205 of the Act.

b. *Notice and Hearing Discussion*

74. Our review of the events leading to the July 2 Order convinces us that we fully complied with applicable statutory and due process requirements. Once we established that MCI lacked authority to provide Execunet service, we properly rejected Execunet. The characteristics of Execunet found in MCI's letter of June 5, 1975, clearly show that Execunet is not a private line service. The discussion of the substantive issues surrounding the Commission's treatment of Execunet, set forth elsewhere in our Order, show the absence, prior to the July 2 Order, of substantial and material issues of fact requiring a full scale evidentiary hearing.

75. Section 4(i) of the Communications Act provides that we are empowered to "make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of (our) functions." The tariff rejection power is beyond dispute where the facts show that a tariff offering is patently in violation of a carrier's underlying authorization. In *Press Wireless, Inc.* v. *F.C.C.*, 264 F.2d 372 (1959), the United States Court of Appeals for the District of Columbia affirmed our rejection of a tariff purporting to extend the carrier's authority to provide a service not previously authorized. In our discussion of the *Press Wireless* offering, we stated:

> [Acceptance of the tariff] would mean that the Commission was transferring to the carrier we were charged with regulating the statutory duty imposed on us by Section 303(b) of the act to prescribe the service rendered by each class of stations . . . Under the Press Wireless theory the carrier would never have to file an application for modification of license

> but would file a modification of its tariff to provide any service it desired . . . Further, the criteria by which its application would be judged would be those in Sections 201-205 of the act, namely, "just and reasonable" rather than those of the public interest, convenience and necessity in Section 309 of the act. *Press Wireless, Inc.*, 25 F.C.C. 1466, 1468, 9 (1958).

Moreover, the Court in another case involving our power to reject a tariff declared:

> An agency has the power and in some areas the duty to reject a tariff that is demonstrably unlawful on its face. Thus, an agency will reject a tariff that conflicts with a statute, agency regulations or order, or with a rate fixed in a contract sanctioned by statute; similarly a tariff will be rejected if it is unlawful without prior agency approval and approval has not been obtained. In such cases the refusal of an agency to reject a tariff may be reviewed by the courts. *Associated Press* v. *F.C.C.*, 448 F.2d 1095, 1103 (D.C. Cir. 1971).

As was the case in *Press Wireless*, MCI was offering a service for which prior agency approval had not been obtained, and thus rejection of the tariff was an appropriate and necessary remedy.

76. At oral argument, however, MCI disputed that *Press Wireless* supported rejection of its tariff. Instead, MCI asserted that its authorizations are issued under Part 21 of our Rules, while those in *Press Wireless* were issued under Part 23. This distinction is without merit. The holding in *Press Wireless* that a carrier may not lawfully tariff a service for which it does not possess the underlying facility authorizations is statutory. As is evidenced by the *Press Wireless* decision, the *statute* requires the Commission to authorize the use of facilities for a service prior to its initiation. Thus in this instance MCI must obtain a new certificate pursuant to Section 214 of the Act, 47 USC 214, prior to offering a

non-private line service. Our authority to reject a tariff that violates a statute or any rule, policy or prescription of ours is well recognized. *Press Wireless, Inc.* v. *F.C.C., supra; Associated Press* v. *F.C.C., supra; Nader* v. *F.C.C.*, 520 F.2d 182 (D.C. Cir. 1975); *Mebane Home Telephone Company* 53 FCC 2d 473 (1975), *aff'd sub nom. Mebane Home Telephone Company* v. *F.C.C.*, Case No. 75-1616, D.C. Cir., decided April 30, 1976, petition for rehearing denied.

77. Further, we provided MCI with notice and opportunity consistent with Sections 204 and 205 of the Communications Act and Section 4 of the Administrative Procedure Act. MCI was informed by letter of May 21, 1975, that we were considering allegations filed by AT&T concerning MCI's authority to offer Execunet. The statutory provisions were met when we informed MCI that it should file with us its comments responding to AT&T's allegations. A copy of AT&T's letter setting out specific arguments addressing the various elements of Execunet and stating that AT&T could not find that Execunet fell within MCI's limited authorization to provide private line service was enclosed. The cover letter stated that AT&T alleged that "your Execunet service is not properly tariffed with this Commission, and that the service constitutes the provision of long distance message telephone service which MCI is not authorized to provide." It then requested MCI to "reply" to us concerning this matter within 15 days. The cover letter certainly provided MCI with notice, as required by Section 4 of the APA, of the time, place and nature of the proceedings. Morover, its reference to AT&T's allegations that Execunet was improperly tariffed and constituted unauthorized provision of MTS provided MCI with notice of the subject of the proceeding and the issues involved. If that was insufficient for MCI to understand the scope of the proceeding, AT&T's attached complaint spelled out the issues. AT&T stated:

> Execunet service is simply long distance message telephone service. MCI never has sought authority to enter the long distance message telephone business (in fact, it has said it did not intend to provide long distance toll service). The Commission has granted MCI authority only to provide private line services and the Court of Appeals, in affirming the Commission decision, has recognized these facts.

In requesting our intervention, AT&T asked that we:

> take appropriate enforcement action to *stop* the unauthorized Execunet service . . . [*P*]*rompt Commission action* would minimize the disruption, inconvenience and economic waste affecting our customers, MCI and MCI's customers. [Emphasis added]

No reasonable person at that point could not have understood the issue being raised nor the relief being requested. This referral commenced the record upon which we based our July 2 Order.

78. MCI's own statements show that it took full advantage of its opportunity to justify the lawfulness of Execunet, and that it considered that opportunity adequate. Indeed, MCI's letter of June 5, 1975 responds to the merits of AT&T's allegations by arguing that Execunet was a private line service comparable to other private line services then offered. The MCI reply of June 5 even sets forth a summary of the issues AT&T has sought out in its complaint. MCI considered the issues to be that it was "through its Execunet service offering interstate long distance message telephone service and that it had not been authorized to provide this service and has not properly tariffed it with the Commission." It then provided a six page rebuttal of AT&T's allegations. In its conclusion, MCI stated that AT&T's complaint was insufficient "to justify or require any Commission action with respect to MCI's Execunet service." In its second letter filed June 9, MCI declared that its letter of June 5 responded "competently and completely"

to AT&T's objections regarding Execunet. Thus MCI's own statements show that it had adequate notice of the issues involved and adequate opportunity to address the merits.

79. Even assuming *arguendo* that MCI was denied adequate notice and opportunity for hearing in the first instance, the instant proceeding fully complies with statutory and due process requirements. First, the July 2nd Order provides notice of the issues respecting the Execunet offering. The Order thoroughly presents the Commission's analysis of the substantive issues surrounding the lawfulness of the Execunet offering. Second, the July 2 Order unequivocally notifies MCI that we have determined that rejection of the Execunet offering is an appropriate remedy if we find that the service is unlawful. Third, the December 3 Order provided an opportunity for hearing by calling for a two stage submission of pleadings and stating that further proceedings will be held if appropriate. When we found that oral argument would be appropriate, we set forth six questions to guide the parties in preparing their arguments. Fourth, in response to a motion by MCI and out of an abundance of caution, in an Order released May 17, 1976, FCC 76-442, we reiterated the legal basis for this proceeding. Fifth, we have concluded, after a thorough analysis of the record, that no substantial and material fact which might necessitate a trial-type hearing remains unresolved. See paragraphs 9-69 and Appendix A. Sixth, since there have been no improper presentations following the filing of AT&T's letter, MCI cannot allege that this remand proceeding was in any way tainted by the undue influence of any party.

F. *Ex Parte Arguments*

80. In its motions filed December 15, 1975, MCI requests a special evidentiary hearing to contest AT&T's off-the-record arguments, to cross-examine representatives of AT&T who presented these arguments, and to submit evidence to correct our understanding of Execunet. MCI

contends that AT&T's informal complaint filed May 19, 1975, was the culmination of AT&T's "preconceived, fully implemented persuasive plan" to persuade us that MCI lacked authority to offer Execunet, and not the initial step in a proceeding concerning MCI's authority to offer its Execunet service. According to MCI, the fact that the July 2nd Order acknowledges the lobbying efforts by AT&T represents clear evidence that AT&T improperly advanced its arguments. That acknowledgment, according to MCI, was insufficient to overcome the prejudicial effect of AT&T's overtures. MCI stresses that its letters of June 9 and July 1 informed us of the apparent breadth of AT&T's activities and sought additional information regarding AT&T's off-the-record allegations to enable MCI to rebut AT&T's statements. Instead, MCI charges, we chose to ignore these demands for a fair proceeding and to order MCI to discontinue Execunet service without ever responding directly to MCI's assertions. While not alleging a specific rule violation, MCI argues that AT&T's attempt to frustrate our decision-making process so tainted our handling of the Execunet matter that a special evidentiary proceeding is required to cleanse the record. According to MCI, only when the extent of AT&T's presentations is known and the tainted record cleansed, may we again deliberate the merits of the Execunet controversy. On a broader scale, MCI argues that the presence of prior contacts in so crucial a proceeding may raise doubts in the public mind concerning the integrity of our decision making process.

81. Pursuant to Section 5 of the Administrative Procedure Act, in an adjudicatory proceeding only the evidence contained in the official record and facts subject to official notice may be considered. According to MCI, unlike routine tariff matters our determination that Execunet was not a private line service, was essentially an adjudication of a particular set of facts involving a valuable privilege, not a rulemaking in the sense that the Commission resolution was applicable to numerous

parties.[14] In accepting off-the-record presentations in the Execunet proceeding, MCI contends we violated the statute by considering evidence not on the record and not available for MCI to contest.

82. MCI also argues that we have failed to comply with judicial precedent setting forth applicable standards of agency conduct in guarding against improper presentations. MCI argues that no real difference exists between the July 2nd Order and those cases where the Courts have required special evidentiary hearings to cleanse the record of improper *ex parte* contacts concerning awards of television licenses. MCI states that the privilege of providing MTS to the public is at least as valuable as a television broadcast license award at issue in an adjudicatory proceeding and should be accorded the procedural protections extended by statute to traditional adjudicatory proceedings. MCI points out that in instances where a court has discovered that television broadcast awards were obtained in proceedings in which allegedly prohibited *ex parte* contacts occurred, we have held, pursuant to the direction of the court or on our accord, a special evidentiary hearing to determine whether improper contacts took place. In *WKAT, INC.*, 258 F.2d 418 (D.C. Cir. 1958) the court remanded a proceeding for a special evidentiary hearing concerning allegations that in a comparative hearing for a television broadcast station construction permit, persons with financial and other ties to a Commissioner exerted improper influence after a hearing examiner had rendered his decision and while final disposition was being considered by us. Like-

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[14] The fact is that our ruling in this case has broad applicability and impacts on many other carriers. The broad applicability of our ruling is recognized not only by the other parties including other specialized common carriers who have participated in this proceeding seeking to limit its broad scope but by MCI itself. On May 20, 1976, MCI filed a motion asking that we begin a proceeding determining the outer boundaries of MTS vis-a-vis private line service which we treat *infra*. Further, MCI itself points to Section 4 of the APA, a section dealing with rulemaking, for its notice rights.

wise, in *Massachusetts Bay Telecaster, Inc.*, 261 F.2d 55 (D.C. Cir. 1958), we considered on remand allegations of improper *ex parte* contacts made after competing mutually exclusive applications had been filed.

83. Moreover, MCI argues that the courts have imposed this standard in rulemaking proceedings involving issues similar to those in Execunet. In *Sangamon Valley Television Corporation* v. *U.S.*, 269 F.2d 221 (1959), the court remanded a rulemaking proceeding for a special evidentiary proceeding when faced with clear evidence of improper presentations during our final deliberations and after the record had been closed. *Sangamon Valley* concerned the allocation of a television channel to one of a number of communities. Unlike the award of a television license, which is adjudicatory, a proceeding concerning channel allocation is rulemaking since the outcome determines the community to be served by the channel rather than the licensee of the station. The court found, however, that the channel allocation proceeding had significant bearing on the ultimate choice of licensee. Thus the court held that *ex parte* contacts between the parties and the Commission decision making personnel after the comment period had closed violated fundamental fairness. In remanding the case for a special evidentiary hearing to determine whether *ex parte* presentation had occurred the court declared:

> The Commission and the intervenor contend that because the proceeding now on review was "rulemaking," *ex parte* attempts to influence the Commission did not invalidate it. The Department urges that whatever the proceeding may be called it involved not only allocation of TV channels among communities but also resolution of conflicting private claims to a valuable privilege, and that basic fairness requires such a proceeding to be carried on in the open. We agree with the Department of Justice. Accordingly, the private approaches to the members of the Com-

mission vitiated its action and the proceeding must be reopened.

MCI argues in the instant case that the proceeding constituted a determination of the award of a valuable privilege: AT&T's monopoly over MTS. Since our finding declared Execunet to be essentially MTS, according to MCI, the proceeding resolved a conflict concerning the award of a valuable privilege. As a result, MCI contends it was entitled to the same treatment in the Execunet proceeding that the court directed in *Sangamon.*

84. MCI next points out that we, on our own accord, have taken remedial action when considering allegations concerning the provision of common carrier service. In *California Water and Telephone Co.*, 7 FCC 2d 571 (1967), we had before us a request for a cease and desist order to be directed against certain AT&T operating companies. Upon notification of allegedly improper contacts between decision-makers and other members of our staff, we informally investigated and concluded that *ex parte* rules applied to that part of the case considering the need for 214 authorization. To preclude possible reliance upon a defective record, we severed that part of the case concerning the issue of 214 authorizations. As in *California Water and Telephone Co.*, MCI contends that the question of lawful operation of Execunet is essentially related authorization pursuant to Section 214 and MCI should have been accorded the treatment the Commission took therein.

G. *Ex Parte Analysis*

85. Section 1.1201 *et seq.* of the Rules set out the rules relating to *ex parte* presentations in adjudicatory and rulemaking proceedings. Section 1.1207 provides that tariff proceedings pursuant to Section 204 and 205 of the Act are restricted rulemaking proceedings "from the day they are instituted." [15] As such Commissioners and their

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[15] "Designated for hearing" was replaced by "from the day they are instituted" in Section 1.1207 of the Rules to remove any impli-

staffs and the Chief of the Common Carrier Bureau and his staff are prohibited from receiving any oral or written communications going to the merits of the proceeding by any interested person without notice to the parties to the proceeding once a tariff proceeding is designated for hearing. The reason for invoking the rules only when a tariff proceeding is initiated is that tariffs are often highly complicated and we have found that informal discussion in advance of a proceeding can quickly clarify issues which otherwise might burden our staff with unnecessary yet time-consuming investigation.

86. AT&T's affidavits state that it terminated its oral contacts with Commission personnel four days prior to filing its informal complaint. This is undisputed by MCI. Thus, it cannot be said that AT&T violated the rules for no proceeding existed when AT&T urged us to act on Execunet on our own accord. Nevertheless, MCI alleges that lobbying before the filing of the complaint pursuaded us to prejudice the case. In support of this contention, MCI relies heavily on court decisions concerning invalid awards of television licenses. In *WKAT, INC., supra,* and *Massachusetts Bay Telecasters, supra,* the courts remanded television licensing proceedings to us for a determination of whether *ex parte* contacts had rendered a license awards invalid. In *WKAT, INC., ex parte* contacts had taken place *after* the case was set for hearing and during the decision making stage of the proceeding. Contacts such as these are contrary to Section 409 (c) (1) of the Communications Act. This section provides that:

> In any case of adjudication (as defined in the Administrative Procedure Act) which has been desig-

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cation that only cases involving a full evidentiary hearing were subject to the *ex parte* rules. "From the day instituted" is intended to apply the *ex parte* rules to a case upon Commission action acknowledging that a case is to be decided and prescribing procedures—i.e., hearing, or written comments, or oral argument, or a conference, etc.

> nated by the Commission for hearing, no person who has participated in the presentation or preparation for presentation of such case at the hearing or upon review shall (except to the extent required for the disposition of ex parte matters as authorized by law) directly or indirectly make any additional presentation respecting such case to the hearing officer or officers or to the Commission, or to any authority within the Commission to whom, in such case, review functions have been delegated by the Commission under Section 5(d)(1), unless upon notice and opportunity for all parties to participate.

Unlike the award of television licenses, however, tariff proceedings are rulemaking and not adjudicatory. Thus the case law of licensing proceedings and the mandate of Section 409(c)(1) are not directly applicable to Execunet.

87. In *Sangamon Valley, supra*, the court found strong evidence of improper *ex parte* contacts requiring a special evidentiary proceeding intended to purge the impropriety from the proceedings. In reaching its decision the court determined that the rationale underlying the need for restricting *ex parte* contacts in adjudicatory matters applied equally to rulemaking involving "conflicting private claims to a valuable privilege." While the court in *Sangamon Valley* broadened the scope of *ex parte* prohibitions by insisting on their application in certain proceedings which were labelled as rulemaking, that case concerned prohibited contacts taking place during the record phase of a proceeding. Subsequent to *Sangamon Valley*, we have adopted rules restricting contacts, inter alia, prohibiting contacts between the public and Commission personnel in rulemaking matters after the institution of a proceeding. See footnote, p. 34.

88. In *California Water and Telephone Company, supra*, involving the provision of allegedly unauthorized service by AT&T affiliates, we ordered that issues involv-

ing 214 authorizations be severed from the proceeding when we found, after an informal investigation, that unauthorized *ex parte* presentations had been made to decision making personnel. There, the prohibited contacts had occurred *after* designation for hearing, and during the course of an adjudicative cease and desist proceeding.

89. A factor distinguishing the July 2 proceeding from each of the above decisions is that in the Execunet controversy the presentation by AT&T occurred *before* formal proceedings began. In fact, those contacts terminated before AT&T filed its informal complaint. Another factor distinguishing this proceeding from the cases cited by MCI is that the July 2 Order did not deal with a privilege to be necessarily granted to only one of several applicants having comparable rights and claims. Since the privilege of providing MTS has been reserved to telephone carriers pursuant to prior policy decisions including the *Specialized Carrier* decision under which MCI's own authorizations arise, there were no mutually exclusive applications at issue. Rather we were dealing with the question concerning the scope of MCI's authorization. The question was therefore whether Execunet was a service lawfully offered pursuant to its tariff. The Commission found simply that MCI's authority to provide private line service did not authorize it to provide Execunet. It was our *Specialized Carrier* decision and not the July 2 Order which considered the award of a valuable privilege. There we extended to MCI and other carriers the privilege of providing *private line* services. Accordingly, MCI's argument that our July 2 Order disposed of competing claims to a valuable privilege is meritless since MCI lacked the scope of authorization necessary to be considered for the privilege it sought, i.e., the tariffing of Execunet service.

90. The events leading to the filing of AT&T's complaint and our July 2nd *Order* show that AT&T acted legally, and that we acted within our authority in rejecting Execunet. Immediately after MCI filed its metered use tariff, meetings were held between our tariff staff and

MCI for the purpose of clarifying the tariff. As a consequence, MCI filed a tariff revision providing clarification of one aspect of the tariff and also promised to file a glossary of clear tariff terms. Instead of filing the promised glossary, however, MCI delayed the filing by explaining that the scope of a modular service offering could not be readily set forth in writing. As a result, questions concerning the tariff were unresolved when MCI offered Execunet to the public.

91. AT&T brought its allegations directly to us upon its discovery of the kind of service MCI was providing under the tariff. According to its affidavits, AT&T made its complaints orally in the belief that we had a duty to act of our own accord after being presented with a description of the Execunet service. The Bureau Staff, however, told AT&T that it should set out its allegations in writing.

92. The evidence developed by the pleadings and affidavits show that AT&T's contacts prior to the July 2 order were within legal bounds. MCI has not alleged that AT&T's representatives had financial or other links to the Commission personnel it contacted nor does MCI dispute the Commission's authority to act on its own accord in this matter. Instead, MCI alleged only that AT&T's "persuasive" presentations blinded the Commission to MCI's defense of its service. This argument is based on a misplaced understanding of the purpose of the *ex parte* rules. It is obvious that interested parties will conduct their arguments aggressively. The *ex parte* rules were not designed to prevent proper contacts, but to draw a line between proper and improper contact between decision makers and the public. In recognition of our responsibility to be informed about day-to-day developments in the communications industry, Congress and the Commission have generally permitted unilateral presentations in rulemaking matters before formal designation. MCI itself is also aware of the usefulness of informal exchanges with us. At page 5 of its July 1, 1975 letter,

MCI agreed that "informal discussions between carriers and Commission personnel are desirable and often necessary." Indeed, MCI acknowledges at least 10 contacts with the Commission's tariff staff between the filing of its metered use tariff and the July 2nd Order.

93. MCI claims that AT&T's presentations amounted to a violation of the *ex parte* restrictions notwithstanding our forebearance in acting on the information supplied us and our staff reminder to AT&T that other procedures were available to press its claims. The regulations concerning restricted rulemakings reflect an intention to protect decision making personnel from off-the-record presentations by interested parties after a case is set for hearing. Here faced with an unauthorized incursion by a carrier into one of its authorized services, AT&T responded by demanding Commission action. As would be expected, it pursued its interests vigorously. The staff, on the other hand, made clear that it would recommend no action to us based on AT&T's oral presentations.

94. In *Rules Governing Ex Parte Communications in Docket No. 15381*, 1 FCC 2d 49 (1965), we concluded that we would determine the fairness of off-the-record presentations falling outside the boundaries of our rules on a case-by-case basis. This proceeding involves allegedly unauthorized service by MCI. It does not involve the disposition of a mutually exclusive license application or the exclusive award of a valuable privilege. To exercise our various functions properly we must retain the flexibility of action. We must be free to initiate proceedings based on the kind of presentation and information AT&T presented here. While our staff for some time had awaited the clarification of MCI's tariff, the fact is that the allegations AT&T presented were of sufficient seriousness for us to initiate an inquiry. Accordingly, based on the facts of this case we cannot find that any violation of due process occurred, and thus we find no basis to hold a special evidentiary hearing concerning those presentations.

95. In the oral argument, MCI argues (Tr. 41) that the occurrence of off-the-record presentations prior to the filing of AT&T's May 1975 letter requires us to hold an evidentiary hearing to determine the impact of the presentation. In support MCI quoted the following language from *Rules Governing Ex Parte Communication in Hearing Proceedings, supra,* at paragraph 9:

> [I]t should be clear that presentations should not be made if the person making the presentation has knowledge of matters which will warrant the classification of the proceeding as a restricted proceeding . . . Ex parte presentations should not be made, for example, by a person who is planning to file a petition to deny or a mutually exclusive application, if the same presentation would be prohibited after the petition or application has been filed.

The validity of that statement is unquestioned. MCI, however, misinterpreted the scope of Docket No. 15381.

96. We examined in Docket No. 15381 only presentations respecting adjudication or record rulemaking proceedings and we specifically pointed out at paragraph 8 that our rules should not be construed as prohibiting or authorizing off-the-record presentations going to the merits or outcome of a non-restricted proceeding. In this context, we have never declared that a complaint, as we interpret AT&T's letter to be, is automatically subject to the provisions of our rules respecting restricted proceedings. At paragraph 8 we stated that we would determine based on the facts of each particular case whether the public interest or due process require its designation as a restricted proceeding. To follow the course MCI now suggests would foreclose our efforts at informal adjustment of differences between members of the public and our licensees, and would bar members of the public from participating in proceedings. In essence the Commission could not entertain any oral complaints because of a fear that if the party was not satisfied with the oral discus-

sion, it might invoke formal proceedings by a written complaint. Such a view of the *ex parte* restrictions would hardly serve the public interest. Clearly it was Congress' intent to make this Commission available to the public for complaint purposes on as broad a basis as reasonable. Any other interpretation would have the effect of limiting the Commission's ability to effectuate its Congressional mandate to police the industry efficiently.

97. In this case we were well aware that AT&T understood there were alternatives to its oral representations in calling our attention to MCI's Execunet service. But we did not believe that AT&T's oral representations of the facts as it saw them should preclude AT&T's further participation. Upon receipt of AT&T's letter containing its allegations we immediately referred it to MCI as a vehicle to institute a proceeding concerning the lawfulness of Execunet. Indeed, we based our decision on MCI's reply to that letter. We have found, however, that it is through flexible responses to the problems of the public that we best serve the public. In this case our staff thought it best not to entertain AT&T's oral complaint. In other situations it may be adequate to entertain oral presentations. Whatever the case, it must be understood that a refusal to receive an oral presentation cannot be equated with a determination to treat a complaint as a restricted proceeding. Until a proceeding is restricted by us, we retain our flexibility to listen to off-the-record complaints concerning matters without our jurisdiction. Thus the contacts between AT&T and the Commissioners as well as Commission staff members, are legal because the *ex parte* rules had not attached. Even now we can find no basis supporting the argument that we should have foreclosed those conversations and imposed the restrictions in the *ex parte* rules from the time of AT&T's initial contact.

98. At oral argument (tr 41) MCI was asked what the Commission should do if the contacts were indeed improper. MCI responded that we should terminate the first

proceeding,[16] have AT&T file a complaint and begin a second one and, in that second proceeding, place the burden of proof on AT&T to prove Execunet is not an authorized service. This proceeding in fact does basically that. Assuming *arguendo* that the July 2 proceeding was tainted, that proceeding was ended as MCI desires. No party has even alleged that this new proceeding is tainted. And certainly it grants MCI all its due process rights. The burden of proof, however, must remain with MCI. The burden of proof in a tariff proceeding, contrary to MCI's argument, is properly upon the proponent of the tariff. See Administrative Procedure Act, 5 U.S.C. 556 (d). In an *Amendment of Part 61 of the Commission's Rules*, in Docket No. 18703, 40 FCC 2d 149 (1973), we stated that the purpose of placing the burden of proof pursuant to Section 556 on the carrier was to provide us with sufficient information to facilitate our judgment concerning the questions of a tariff's lawfulness. See *American Trucking Associations, Inc.* v. *F.C.C.*, 377 F.2d 121, 133 (D.C. Cir., 1966) cert. denied 386 U.S. 943 (1967); AT&T (Hi-Lo), 58 FCC 2d 362 (1976). Accordingly, the burden of proof must be on MCI since MCI has unique access to factual information necessary in resolving questions concerning the lawfulness of MCI's Execunet tariff. Thus, the instant proceeding, initiated pursuant to the Court's remand, offered MCI exactly the kind of review it has requested within a proper procedural framework.

H. *Outstanding Motions*

99. Several motions filed by MCI remain outstanding. Of those filed on December 15, 1975, we deferred ruling on all but one in our *Memorandum Opinion and Order*, 57 FCC 2d 666 (1976). We also deferred action on one of

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[16] MCI's view is that there is no reason to discern the impact of the improper contacts because it is irrelevant—any improper contacts taint the entire proceeding.

a series of motions filed on April 16, 1976 (*see Memorandum Opinion and Order* released May 17, 1976, FCC 76-442). Finally, as noted, MCI on May 20, 1976 filed a Motion for Inquiry into Public Interest Considerations Regarding Establishment of a Communications Monopoly (May 20 Motion). These motions are before us for ruling.

100. In regard to the December 15 motions, we dismissed as moot the Motion to Preserve Evidence, since AT&T had said it would not destroy any relevant material. In a second motion, MCI requested us to admit that we never informed MCI, prior to the filing of AT&T's May 19, 1975 letter, that we had any questions concerning MCI's authority to provide its Execunet service. While we will not admit that the staff of our Common Carrier Bureau never informed MCI that it had questions regarding the lawfulness of the Execunet offering in the time period in question, we further believe that the issue is not relevant to our decision herein. Our findings that MCI was not denied due process and that AT&T's oral representations were not unlawful do not in any way turn on whether or not our staff had informed MCI that it was examining the lawfulness prior to the AT&T letter.

101. MCI also filed a motion to take deposition of Thomas W. Scandlyn, Assistant Vice President of AT&T. We believe such an examination is unnecessary. Mr. Scandlyn said in an affidavit that he had made certain representations to the Commission prior to May 15, 1975, and it is undisputed that such contacts ceased at that time. We have found that the contacts were not unlawful and did not, as MCI contends, prevent us from objectively examining the views of all the parties to these proceedings. We therefore believe it would be inappropriate for us to permit MCI to take a deposition of Mr. Scandlyn in this matter.

102. In its filings both of December 15 and of April 16, MCI requests us to initiate and conduct a special evidentiary hearing as to AT&T's "*ex parte* contacts with Commission personnel." We deferred ruling on those mo-

tions until we had heard oral argument and had fully examined the record. Upon examination of the entire record, as indicated herein, we have found that AT&T's representations, made prior to the filing of any opposition to MCI's tariff or to its Execunet offering, were not unlawful and did not prevent us from deciding the issues in this case objectively. We have further concluded that, assuming *arguendo* that Bell's contacts were unlawful, the present proceeding, initiated *ab initio* upon remand from the Court of Appeals, cured the improprieties. Accordingly, we deny MCI's motions and decline to hold the requested further proceedings.

103. We also have before us the May 20 motion. MCI asserts therein that we have never determined to what extent, if any, AT&T is granted a monopoly over certain interstate telecommunications services. It requests that we institute a general inquiry to determine those areas which the public interest requires to be a monopoly and those which should be open to competition. Finally, MCI asks us to hold the present proceeding in abeyance until such a further investigation is completed.

104. MCI proposes seven specific issues to be explored in this proposed investigation:

1. Is there any communications service that should be preserved as a monopoly for AT&T and its telephone company partners and that other carriers should be precluded from providing?
2. Specifically, should other carriers be precluded from providing MTS service?
3. If so, what is a precise definition of MTS?
4. Should the Commission's decision in Docket No. 19117 be reopened and revised so that all carriers would be required to obtain prior authorization from the Commission before offering new services?
5. If Bell is to receive legal sanction of a monopoly over certain services, what steps can and should

the Commission take to prevent Bell from so structuring and pricing its monopoly services so as to undercut the competitive services of other carriers? Should the Commission require Bell to spin-off its competitive services to a separate, unaffiliated company?

6. Would the dangers of cross-subsidization of competitive services be reduced if Bell were *not* given a monopoly over any service, in the expectation that it would be inhibited from significantly inflating the rates of such a service for fear that such a course would invite competition for that market also?
7. Is there an overriding public interest in permitting all carriers to innovate and to offer new services freely and without artificial restraint?

105. In support of its petition, MCI cites certain recent tariff amendments and other proposed services which, it asserts, are highly cross-elastic with each other and with Message Telecommunications Service (MTS) and allegedly contain elements which are similar to Execunet. These, MCI contends, should be taken into consideration when drawing any line between monopoly and competitive services.

106. AT&T has responded in part to this petition by disagreeing with MCI's characterization of recent amendments to AT&T's Private Line Tariff, FCC No. 260, and Western Union Telegraph Company's (Western Union) Hot Line service offering in its Tariff FCC No. 254. AT&T attaches a letter from Western Union dated May 18, 1976, explaining the Hot Line tariff amendments.

107. At the outset, we disagree with MCI that we have never defined the areas of telecommunications service which should be open to competition and those which are a monopoly. Rather, that was the principal purpose of our investigation in Docket No. 18920, *Specialized Common Carriers.* In the *First Report and Order* in that proceeding, 29 FCC 2d 870 (1971), *aff'd sub nom Wash-*

*ington Utilities and Transportation Commission* v. *FCC*, 513 F.2d 1142 (9th Cir., 1975), *cert. denied*, 423 U.S. 836 (1975) (*Specialized Common Carrier* decision) we authorized MCI and other specialized carriers to offer services in competition to AT&T and other established carriers only in the private line telecommunications field.

108. We have discussed at length (paras. 33-43), the limitations placed upon specialized carriers' authorized service. We also recognized in the *Specialized Common Carrier* decision that the existing services of AT&T and Western Union, primarily MTS and Public Message Telegraph Service, were not being made subject to competition by the newly emerging carriers (*supra*, para. 36). Further, as indicated above, we considered potential impact of competition on AT&T and Western Union in light of our policy that the specialized carriers would be offering only private line services and would not divert revenues from other services of the established carriers (29 FCC 2d at 910-14).

109. In essence, MCI is therein asking us to reopen the *Specialized Common Carrier* decision to determine again what services should be open to competition. We decline to do so. The changed circumstances MCI cites for such an inquiry are new filed or proposed service offerings of established and other competing carriers. There is no allegation that the public interest considerations upon which the *Specialized Common Carrier* decision were based have changed at all, nor that the economic character of the communications industry has changed so drastically that we should re-examine the industry structure.[17]

110. Of the specific services which MCI cites in its Motion, those proposed by Satellite Business Systems and IT&T do not exist and have never been filed as tariff offerings. Rather, we have received facility applications from both carriers, and these applications are presently

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[17] We are presently examining the economic impact of competition on the industry in our Docket No. 20003.

under review. As to those offered by AT&T and Western Union, we disagree with MCI's characterization of them. We agree with Western Union's characterization in its letter to AT&T that its Hot Line offering is not a dial-up service, but rather is strictly point-to-point. The user does not have access to the general public in a distant city, as MCI asserts, but rather can reach a specified distant premises which is not a telephone company central office. There is therefore, unlike Execunet, no direct access to a local exchange.

111. By the same token, MCI's characterization of AT&T's amendments to its private line tariff is misleading.[18] The amendment permits off-network access from Inward WATS, local exchange or FX lines into a Common Control Switching Arrangement (CCSA) network, but it does not allow access by the off-network user to the general public. The tariff provision referred to makes it clear that the connection is for inward access to the customer's CCSA (private line) network only. It does not permit access to another telephone off the network through the CCSA network.

112. Accordingly, we find that the services presently in effect that are cited in MCI's motion are not, as MCI characterizes them, similar functionally to Execunet. The other services proposed by other carriers mentioned in the pleading are not presently on file, and we can make no determination as to their lawfulness. Finally, MCI has cited no changed circumstances which would require a reexamination of our policies regarding competition for domestic communications services, as established in the *Specialized Common Carrier* decision.

113. As indicated, our July 2 Order is presently under stay, and the Court has retained jurisdiction over this matter. Therefore, until further action of the Court, we

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[18] The amendment to which MCI refers was filed on November 26, 1975, (Transmittal No. 21455), effective December 26, 1975, and rates were merely increased by the filing effective March 29, 1976, cited in the Motion.

cannot effect an Order requiring MCI to terminate offering Execunet service. However, in the event the Court lifts the stay, we believe MCI's customers require a thirty day notice from publication of this Decision in order to seek alternative communications services.

114. Finally, MCI, ASC and AT&T have filed motions to correct the transcript of the oral argument. AT&T objects to several of MCI's proposed corrections on the ground that the transcript is accurate. MCI, in all but two of its disputed items, does not disagree but rather asks us to correct misspoken words or phrases. In two items, purported statements by Commissioner Hooks, MCI argues that the transcript is an incorrect representation of the recorded argument.

115. We agree with AT&T that the transcript should represent a verbatim rendition of the proceeding, and therefore we deny MCI's motion to correct these items. In regard to the statements of Commissioner Hooks, the staff has listened to relevant portions of the tape of the oral argument and has concluded that the transcript is correct.

116. Accordingly, IT IS ORDERED, That MCI Telecommunications Corporation Tariff FCC No. 1 IS REJECTED insofar as it purports to offer Execunet service.

117. IT IS FURTHER ORDERED, That MCI must cease offering Execunet service thirty days after release of this Decision or upon removal of the stay in *MCI Telecommunications Corporation* v. *FCC*, Case No. 75-1635, D.C. Cir., whichever occurs later.

118. IT IS FURTHER ORDERED, That the following motions of MCI ARE DENIED: Request for Admission of Fact by the Commission, Motion to Take Deposition by Oral Examination of Mr. Thomas W. Scandlyn, Motion for Initiation and Conduct of a Special Evidentiary Hearing, Motion for Special Evidentiary Hearing as to AT&T's Ex Parte Contacts with Commission Personnel, Motion for Inquiry into Public Interest Considerations Regarding Establishment of a Communications Monopoly.

119. IT IS FURTHER ORDERED, That the motions filed by ASC and AT&T asking us to correct the transcript of the oral arguments ARE GRANTED, and that filed by MCI IS GRANTED IN PART AND DENIED IN PART.

120. IT IS FURTHER ORDERED, That the charts submitted by AT&T at Oral Argument are made a part of the record in this proceeding.

121. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

CONCURRING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS IN WHICH COMMISSIONER ROBINSON JOINS

In Re: *Execunet*

There is a loose thread dangling from this proceeding which could and should have been snipped at this point. To leave the *ex parte* allegations hanging is to leave the impression that there might be merit in the instant charges. This, patently, is not the case and the longer we leave it flapping from the flagpole, the greater the danger that someone might come along and salute it.

MCI has alleged that communications pertaining to Execunet were made to Commission personnel prior to the release of our *Order* of July 2, 1975, FCC 75-799. However, nowhere does MCI suggest that any such presentations occurred subsequent to AT&T's complaint.[1] More importantly, MCI does not barely intimate that the Execunet matter was then before the Commission in any

[1] AT&T's letter of complaint was filed, and served on MCI, May 19, 1975. On June 9, 1975, MCI's president wrote to the Commission and asked for "equal time." On June 16, 1975, the Commission responded to MCI stating that MCI had already held a series of meetings with FCC personnel on the Execunet matter.

cognizable posture, let alone the quasi-adjudicatory posture necessary to bring such discussions within the purview of our rules. See generally, 47 CFR Part I, subpart H.[2] Adversions to *Sangamon Valley Television Corp.* v. *FCC*, 269 F.2d 221 (D.C. Cir. 1959) are similarly deficient. The facts in *Sangamon* likewise reflect presentations subsequent to the initiation of a proceeding bringing the matter before the agency. Other citations used by MCI are devoid of support for its assertions for the same reason.[3]

Absent allegations which even suggest a transgression of pertinent *ex parte* strictures, it would be proper to sever and drop the issue at this point. Without foreclosing the possibility of new allegations at Oral Argument, there is nothing on the present record to warrant retention of the issue in an unresolved state.

## APPENDIX A

In its comments filed in this proceeding MCI listed a number of alleged similarities between its Execunet service and private line foreign exchange (FX) service. It also listed differences between Execunet and Message

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[2] Whether this proceeding is considered adjudicative or in the nature of restricted rulemaking, the same result would here obtain. The Commission's rules relate to presentations occurring after the filing of inaugural pleadings in adjudicative cases, 47 CFR § 1.1203, and after the institution of a rulemaking, 47 CFR § 1.1207. The rules could not invoke any other logical time for inception. To apply *ex parte* restrictions before the initiation of a proceeding would be to foreclose significantly industry-Commission dialogue on any matter of business because that matter *might* someday erupt in the course of a quasi-adjudicatory proceeding. And, the Commission has described its own rules as more stringent than required by statutory law. *American Television Relay, Inc.*, 9 FCC 2d 1004, 1009 (1967).

[3] The recent request of the U.S. Court of Appeals for the District of Columbia Circuit in *Home Box Office, Inc.* v. *FCC* (No. 75-1280) merely lends support to my argument. That *Order* requested only a listing of presentations made "during the rulemaking proceeding, *i.e.*, from the date the notice of rulemaking was published. . . ."

Telecommunications Service (MTS) as offered by AT&T. In addition to the existing fulltime FX service, MCI included characteristics of a hypothetical shared FX service in its comparison. The list which follows includes a brief discussion of the validity and relevance of each of the characteristics.

I. Similarities between Execunet and FX: *

A. *Customer must subscribe to service in advance.* This is true of WATS, and in the case of a new installation, of MTS. It is not a unique characteristic of private line service.

B. *Customer can terminate service only after giving thirty days notice.* While this is not true of MTS or WATS, AT&T's WATS tariff requires a minimum thirty day initial subscription period. However, it is certainly not a functional characteristic which describes any specific category of service.

C. *Not accessible from all telephones in calling city.* Despite MCI's assertions, Execunet *is* available from all telephones in the calling city. If the particular instrument used is not a push-button telephone, a separate instrument can be easily purchased or leased which permits access to Execunet from any dial telephone.

D. *Cannot access all telephones in U.S.* MCI's facilities and tariff offering permit the Execunet customer to access telephones in only certain specified cities, but this is because MCI has chosen to offer the service only in those cities. MCI is not precluded at some future date, upon proper Commission authorization, from expanding its network to the point of having sufficient offices to permit access to all telephones in the U.S. It should also be noted that a WATS subscriber generally has access to only a limited geographical area. Again, this is

* MCI comments, Attachment A, Affidavit of Bert C. Roberts, Jr. 64-65.

not a functional characteristic which typifies private line (or FX) service.

E. *Not marketed to the general public.* While MTS is marketed to the general public, WATS and Execunet are not, although any person or business has the right to subscribe to such services. The fact that MCI structured the service (by imposing a minimum charge) and marketed the service so that it aims at a certain specified segment of the business community does not change its functional character. MCI is willing and *required* to make the service available to anyone who requests it.

F. *Subscriber can use dedicated circuit to access system.* The key factor here is that a subscriber *can* but *need not* obtain a separate local loop dedicated to this one service. Under most circumstances, he will use his local business telephone line to access the Execunet system. MCI has testified that *no* Execunet customer presently uses a dedicated circuit to access the system. Thus, it does not significantly differ in type of access from MTS.

G. *Accessible from push-button telephone.* Virtually any telephone service, including MTS and WATS, is available from a push-button telephone. Therefore, the fact that Execunet utilizes such a telephone instrument does not characterize the service as private line.

H. *Service does not run from customer premises to customer premises.* This appears to be a characteristic which equates Execunet to MTS and WATS, not private line. While it is true that FX runs from one customer's premises to a distant exchange, Execunet, like MTS, permits the customer to access the system from on or off his premises and to access any telephone in one of 14 other cities.

I. *Uses dedicated intercity circuits.* The Execunet intercity circuits are dedicated to the service, although they are shared by all users. However, unlike existing private

line service, no local facility is dedicated to that service and not used in common for local exchange service.

J. *Intercity circuits shared are most efficient, lowest cost operation.* Again, this is true of MTS and not of most existing private line services, which use dedicated intercity trunks. While the presence of such shared trunks does not render the service not private line, neither is it a characteristic which identifies the service as private line.

K. *Metered basis for long-haul charges, with minimum.* As with J., above, this is not a typical characteristic of private line service. Rather, MTS is charged on a metered use basis, as is WATS, and WATS includes a monthly minimum.

L. *Charges do not vary with time of day.* Time-of-day pricing is only a comparatively recent development for MTS and is not available with WATS. The absence of such pricing is not necessarily indicative of private line service.

M. *Charge for termination in called city.* While it is true that MCI imposes a minor charge for termination of the call in the called city, it is neither a full time local business charge as is imposed for full time FX nor a separate termination charge for each distant termination city, as is a minimum requirement for private line service.

N. *User provided full details as to all calls.* No presently offered private line service gives the user any breakdown by call, and presently only MTS provides this service.* The fact that MCI gives the Execunet subscriber greater detail than AT&T supplies the MTS customer does not change the character of the service. The greater detail is a convenience feature which, though it may be useful, does not functionally differentiate the Execunet service from MTS.

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* The WATS subscriber can obtain a similar breakdown by paying an accounting cost.

O. *Customer is charged for exact total of usage of each city accessed.* MCI aggregates the total connect time of a customer to a distant city over a billing period, so that fractional minutes may be combined into whole billed minutes. While MTS charges for fractional minutes as whole minutes for each call, the fact that MCI aggregates them may save the customer some money, but it by no means is a functional difference between the services. Rather, it is a minor billing difference which by no means is characteristic of private line service.

P. *Unlimited access to service.* Authorized users of the customer may make several calls simultaneously over the Execunet system. This is given as a characteristic of FX, not of MTS, but without explanation of the manner in which an FX subscriber, with a single line, can place more than one call simultaneously. It appears that only MTS of non-Execunet communications offerings permits such simultaneous use. In the case of MTS, the subscriber must either lease more than one local exchange channel or must place the call from off his premises (charging it to his own number) in order to make more than one call simultaneously. In fact, the Execunet subscriber wishing to place more than one call simultaneously from his premises must subscribe to more than one local exchange channel.

II. Differences between MTS and Execunet.** Where the listed characteristic is discussed above, a reference is made to that discussion. The first nine items are alleged to be true of MTS but not Execunet, the remaining seven are asserted to be characteristic of Execunet but not MTS.

1. *Accessible from all telephones in calling city.* See item C above.

2. *Smaller number of digits pulsed or dialed.* Again, this can hardly be considered a functional difference between

** MCI Comments, Attachment A. 55-56.

MTS and Execunet. It should be noted that over the years the number of digits required for MTS have continued to increase with the introduction of dial service, Direct Distance Dialing, and other services. Clearly, the number of digits required is not an indication of the type of service being offered.

3. *Can access all telephones in U.S.* See item D above.

4. *Marketed to the general public.* See item E above.

4. *Can place person-to-person, credit card, collect and conference calls.* These are additional convenience services which AT&T offers to its MTS users. If they were not offered, the service would still remain MTS and a majority of the calls made, those placed station-to-station, would be unaffected. AT&T contends that the ability of an authorized user to place a call from another city or another premises using his identification number amounts to a collect or credit card call. Since the listed MTS features are not essential characteristics of that service and do not distinguish MTS from Execunet, this contention has no relevance and need not be ruled upon.

6. *Can get directory assistance in distant city.* Since it is apparently possible to call directory assistance over the Execunet network, we must assume that MCI is referring to such assistance at no charge. Again, this is merely a convenience feature, the cost of which is absorbed by all MTS users. It should be noted that Execunet subscribers can obtain distant numbers by calling information over the MTS network. Further, several states have imposed a charge for directory assistance calls within their jurisdiction. Therefore, free directory assistance is by no means a distinguishing characteristic of MTS.

7. *Has minimum calling period for billing.* As discussed in item O above, this is but a difference in billing procedures. Furthermore, it should be noted that while MTS has a pre-call minimum billing period (either one

or three minutes), Execunet imposes a monthly minimum ($75).

8. *Adds charge for a full minute if call exceeds minimum by a matter of seconds.* See items O and 7 above.

9. *Includes see-while-you-talk service (Picturephone) and 50 kilobit switched service.* As with item 5 above, these are additional features, added recently to basic MTS, which are not part of AT&T's basic service. Both are currently used by a small specialized market, not by the general public.

10. *Uses identifying access code.* Both MTS and Execunet use such a code, but the code used for MTS is the subscriber's telephone number which the central office equipment is able to identify. The Execunet subscriber must actually pulse his code so that the equipment can identify him and to start the billing procedure. That is clearly a minor difference between the services.

11. *Uses shared dedicated intercity facilities.* See items I and J above. MTS intercity facilities are shared, even if they are not dedicated to one service.

12. *Subscriber can use dedicated circuit to access system.* As pointed out in item F above, the key point in this statement is that the subscriber can but need not use dedicated local loops, and no subscriber currently uses this method of access. Since the option is with the subscriber, and since the least expensive method of access is by using a local exchange telephone circuit, the distinction loses its significance.

13. *30 day minimum contract for service.* See item B above.

14. *Minimum monthly charge.* As discussed in items O and 7 above, Execunet has a minimum monthly charge while MTS imposes a minimum billing period for each call. The distinction is not a functional one but is but one of billing practice. A minimum monthly charge is

also a characteristic of the tariffs for WATS.

15. *Provides full detail on all calls.* See item N above.

16. *Charge for exact monthly total of usage to each city accessed.* See items O, 7 and 8 above.

APPENDIX B

FCC 75-799

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON D.C. 20554

July 2, 1975

MCI Telecommunications Corporation
MCI Building
1150 - 17th Street, N.W.
Washington, D.C. 20036

Attention: Mr. William G. McGowan
Chief Executive Officer

Gentlemen:

As you are aware, the Common Carrier Bureau has been investigating your service, marketed under the name "Execunet," and the staff of the Bureau has been in continuous contact with you since prior to the effective date (October 10, 1974) of your revisions to MCI Tariff F.C.C. No. 1. A number of conversations have taken place between Bureau staff members and members of your staff since that date concerning both the offering of Execunet service and the above tariff revisions.

We note that your letters of June 9 and July 1 comment upon contacts between AT&T and the Commissioners and the staff. Prior to any such contacts, as we noted above, the staff and several Commissioners were cognizant of your service offering and had questions concerning it, and such concern had been brought to your attention by the staff. When AT&T expressed concern to several Commissioners and to the Bureau staff regarding the lawfulness of this service, it was suggested that the appropriate course to follow would be to file a complaint. We note that the informal complaint which was filed was submitted to you for comment by letter

dated May 21, 1975. Thereafter, you had a period of over one month to comment on the merits. During this period, you have filed three separate letters which we have considered herein. Thus we conclude that you have had ample opportunity to comment upon the merits. The present letter contains the Commission's conclusions regarding Execunet service.

The principal question considered in this investigation was whether or not Execunet, as offered by MCI, constitutes the type of service which your company is authorized to provide. *Specialized Common Carrier Services*, 29 F.C.C. 2d 870 (1971), which established the Commission's policies regarding entry of the specialized common carriers in competition with AT&T, contemplated such entry only in the private line field, not in the area of switched public message telecommunications service. For example, in discussing the projected growth in telecommunications services, the Commission stated: "It is clear, moverover, that this projection is based primarily upon the rapidly expanding growth in local and interstate use of the standard voice communications services of the Bell System—*services which the applicants do not seek to provide.*" 29 F.C.C. 2d 870, 904 (emphasis added).

The discussion in that decision relating to the economic impact of competition is replete with language indicating that the Commission was referring to competition in the private line services field (*see*, 29 F.C.C. 2d 870, 910-12). Further, in discussing the services proposed to be offered by the new carriers, the Commission indicated (20 F.C.C. 2d 870, 874-6):

> There are also pending applications by 17 MCI associated companies for portions of a proposed nationwide network to provide specialized private line communications services . . . According to MCI, the 'real distinction which delineates MCI service from anything provided today by existing common carriers is not the facility itself but the manner in which

> a customer may utilize it in order to provide a customized intra-company point-to-point communications system of his own design and capability.' . . . The existing carriers serving the proposed routes allegedly do not and cannot readily provide the same type of offering . . . [MCI] would do so without having an adverse economic impact on the existing carriers or affecting their telephone or private line rate-making principles. There is, MCI says, 'a distinct difference between a public telephone service which is a natural monopoly and a customized communications service offered on a private point-to-point basis.'

In the various Commission orders granting the Section 214 applications of the MCI carriers to construct and operate facilities (e.g., 32 F.C.C. 2d 36 (1971), FCC 72-456 (May 26, 1972), FCC 72-832 (September 22, 1972), FCC 72-852 (September 29, 1972), appears language similar to the following:

> The service proposed is essentially private line for the transmission of data, facsimile, control, remote metering, voice and other communications.

Each grant refers to the paragraph which incorporates the above language as conditioning the grant of construction and operating authority. As a result, MCI is only permitted to operate its facilities for private line services.

Further, in our *Second Report* on domestic satellites, which followed the *Specialized Common Carrier* decision, we pointed out, 35 F.C.C. 2d 844, 853 (1972)):

> In encouraging multiple entry and the development of competition in the supply of domestic communications, we have maintained a distinction between the so-called monopoly switched telephone services now being furnished by AT&T and all other classes of existing and potential specialized services.

It is thus clear that MCI sought authorization to offer only private line services, and that it was granted authority to offer only such services.

Our understanding of the Execunet service offering is as follows. A customer in the calling city calls a local telephone number from any push-button telephone in the local exchange area. He then pulses his customer code and the area code and calling number of any telephone in one of a number of distant cities. Upon connection, the customer is charged a per-minute toll, based upon the mileage to the city called, subject to a connection charge and a monthly minimum charge. Any MCI Execunet customer in the calling city can access the system at any time to place a call, and presumably many such customers may utilize the intercity facilities simultaneously. In other words, none of the MCI plant is dedicated to the use of a particular customer during any specified time; rather it is available upon demand. Clearly, therefore, the Execunet service is not a traditional two-point or multi-point private line offering connecting two or more specified customer locations.

In his letter of June 5, 1975, Bert C. Roberts of your company equated Execunet to AT&T's foreign exchange (FX) service offering, Series 2006 of its Tariff F.C.C. No. 260. In response to that allegation, we shall now address the specific differences between FX as offered by AT&T and your Execunet offering. First, FX is specifically excluded from the joint use provision (3.1.5) of Tariff 260, while the inter-city facilities used for Execunet are shared by all users of the service. Second, FX is available to access one distant exchange area toll free, from the customer's premises in the calling city, while Execunet can be accessed directly from any push-button telephone (or from any telephone, using a separate tone generator) in the calling city to call any telephone in any one of a number of distant cities, but always at a toll charge. Third, an FX customer uses dedicated facilities from his location to the distant telephone com-

pany exchange office, and these facilities are available at all times, while the Execunet customer uses common local exchange plant at both ends, connected by inter-city facilities which are not dedicated to any specific customer but are shared by a number of customers. Fourth, the FX customer is billed a periodic charge for the FX line, calculated on a mileage basis, plus a monthly local service charge at the distant location, while the Execunet customer is billed for each call, based upon time and distance, subject to a monthly minimum, with no charge added at the distant city.

Execunet is therefore distinguishable from the above-mentioned services which AT&T includes in its private line tariff, F.C.C. No. 260, while there are many basic similarities between Execunet and MTS. For example, both use non-dedicated local and inter-city facilities, both are accessible on demand by any customer, both charge on a per-call basis, both are available from any telephone in the calling city (Execunet is subject to the push-button telephone limitation, but this is caused only by technical limitations) and both may be used to call any telephone in one of a number of distant points.

While no one of these characteristics is necessarily sufficient in itself to classify Execunet as identical to MTS, the combination of these similarities, under the factual situation presented here, inescapably leads the Commission to conclude that your Execunet service is essentially a switched public message telephone service, rather than private line.

In your July 1, 1975 letter on pages 8 and 9, you cite various service offerings which you feel are the same as Execunet. While it is clear that some of these offerings may contain certain elements similar to Execunet, they are not the same service as Execunet nor does any one service contain all the elements of Execunet. For example * customers of Datran Datadial service, Western Union Hotline service, and Composite Data Service Vend-

ors are not able to access the general public as are customers of Execunet. Customers of specialized common carrier FX-type services must, by definition, have a "closed-end" terminating at a customer's premises.

Since your authorizations are limited to private line services, you cannot lawfully tariff and operate other services on these facilities. *Press Wireless, Inc.* v. *F.C.C.*, 264 F. 2d 372 (D.C. Cir. 1959). As a result, your tariff F.C.C. No. 1 is hereby rejected insofar as it purports to offer Execunet service, but without prejudice to MCI's offering any other service which you are authorized to provide. To afford your customers a transition period in which to arrange for alternative service, the effective date of this order shall be 30 days from its release.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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* Our discussion of any of these services does not constitute a finding as to their lawfulness, as that is not before us.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

May 21, 1975

MCI Telecommunications Corporation
MCI Building
1150 - 17th Street, N.W.
Washington, D.C. 20036

Attention: Mr. William G. McGowan
Chief, Executive Officer

Gentlemen:

Enclosed is a copy of a letter dated May 19, 1975, which Chairman Wiley received from Mr. James R. Billingsley, Vice President of the American Telephone and Telegraph Company. Mr. Billingsley states that your "Execunet" service is not properly tariffed with this Commission, and that the service constitutes the provision of long distance message telephone service which MCI is not authorized to provide.

Your comments on this matter would be appreciated. We trust you will be able to reply, in duplicate, within 15 days of the date of this letter.

Sincerely yours,

WALTER R. HINCHMAN
CHIEF, COMMON CARRIER BUREAU

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY
195 Broadway
New York, N.Y. 10007

James R. Billingsley
Vice President

The Honorable Richard E. Wiley
Chairman
Federal Communications Commission
Washington, D.C. 20554

Dear Chairman Wiley:

I am writing to call your attention to the fact that MCI Telecommunications Corporation is currently offering interstate long distance message telephone service. MCI has not been authorized to provide this service, which it calls "Execunet", and has not properly tariffed it with the Commission.

Briefly, in the Execunet service, the MCI subscriber utilizes ordinary local telephone service to call any Bell or Independent Telephone Company subscriber in specified distant localities. None of the facilities used in the service are dedicated; they are instead trunks, access lines, and switching used in common by all users. (MCI's customers may also use Execunet service from a dedicated facility tied to a switchboard or key set.)

An MCI Execunet customer can use any ordinary exchange telephone (including public coin telephone) to call a telephone number for which MCI has subscribed in the originating city. After the customer gives an identifying code, he pulses the standard telephone area code and seven-digit number of the party he wants in a distant city. MCI carries the call over its facilities to the distant city and puts the seven-digit number into telephone company facilities. The telephone company then has to complete the call as if it were an ordinary local

call placed by a local telephone subscriber. The local telephone company does not receive any of the usual compensation for completing an interstate long distance call.

Execunet service is simply long distance message telephone service. MCI never has sought authority to enter the long distance message telephone business (in fact, it has said it did not intend to provide long distance toll service). The Commission has granted MCI authority only to provide private line services and the Courts of Appeals, in affirming Commission decisions, have recognized these facts.

The Commission has indicated on several occasions its concern with the technical and economic effects on the nation's consumers of fragmenting the long distance message business.

MCI is promoting its services with those who make a large portion of the toll calls between big cities. The provision by MCI of long distance message telephone service will adversely affect the nation's telephone users at both the interstate and intrastate levels. It could, if continued, result in a marked increase in the cost of local and long distance services for the large body of telephone customers, both residence and business.

MCI's tariff filings with the Commission have not reflected its entry into the message toll telephone business. Its tariffs do not adequately describe Execunet service as it is described in MCI's promotional literature or as it is in fact being provided.

I hope that the Commission will take appropriate enforcement action to stop the unauthorized Execunet service. It appears to me that the public interest demands no less.

Prompt Commission action would minimize the disruption, inconvenience and economic waste affecting our customers, MCI and MCI's customers.

Very truly yours,
JAMES R. BILLINGSLEY

MCI TELECOMMUNICATIONS CORPORATION
MCI BUILDING 1150 17th St., N.W.
WASHINGTON, D.C. 20036

Vice President

June 5, 1975

Mr. Walter Hinchman
Chief, Common Carrier Bureau
Federal Communications Commission
Washington, D.C. 20554

Re: Your Reference No. 9510

Dear Mr. Hinchman:

On behalf of MCI Telecommunications Corporation, I am responding to your letter of May 21, 1975, requesting comments on a letter dated May 19, 1975, to the Commission from Mr. James R. Billingsley, Vice President of the American Telephone and Telegraph Company (AT&T) concerning MCI's Execunet service. My responsibilities at MCI include both tariff administration and the development of new services, of which Execunet is one.

Mr. Billingsley claims that MCI, through its Execunet service, is offering interstate long distance message telephone service and that it has not been authorized to provide this service and has not properly tariffed it with the Commission.

I am surprised that AT&T is objecting to the FCC about the Execunet service at this late date. The tariff matter which, with previously filed tariff provisions, offered the service, was filed with the Commission on September 10, 1974, (with Transmittal No. 16) and went into effect on October 10, 1974. MCI has publicized and marketed the service since late 1974. As I am sure you know, AT&T has furnished MCI—as it is required to do by past commission orders—with the local facilities necessary to provide Execunet service. It has billed us for

such service and has been paid. So, there can be no doubt that AT&T has been aware of MCI's Execunet service offering since at least October 1974, when business access lines were first ordered in anticipation of January service dates. Such lines for use in offering Execunet service have been ordered from most of the Bell Operating Companies. Their local representatives have asked questions concerning the MCI tariff provisions for this service and were given the appropriate tariff references. However, no formal action was taken prior to Mr. Billingsley's letter.

As you are undoubtedly aware, MCI has discussed the Execunet service on several occasions with your staff, both before and after the filing of the tariff changes under which the service is offered to the public. As was explained to the staff, Execunet is a private line service which permits sharing of intercity circuits terminating in business telephone arrangements in distant cities for the provision of what AT&T calls foreign exchange (FX) service. The Commission has, on numerous occasions, held that MCI is authorized to provide such service. Execunet is also a form of Metered Use Service, a general category of service covered by tariff provisions which—as pointed out above—were filed with the Commission on September 10, 1974.

As was explained in the covering transmittal letter, Metered Use Service was designed for the business user not having sufficient communications requirements to utilize MCI's other private use offerings. The service was offered not only to enable MCI to achieve greater uitlization of its backbone microwave system, but also to provide service to the smaller business user at prices he could afford and to enable heavier-volume users to supplement their other MCI service, thereby obtaining an efficient mix of service more closely matching their specific needs. Metered Use Service was offered on a per-mile-per-hour basis, with a minimum charge of $75.00 per month applicable to the combined Long Haul and

Customer Service charges. MCI also added a provision that, at a customer's request, when a circuit is terminated in a local business telephone line, a charge of $15.00 per month would apply. That termination charge, of course, applies to FX services such as Execunet. Metered Service is covered in Section D-1.02 (page 19) of the MCI tariff in a description of MCI's Private Use Service, and is also referred to in Section C-3.02 (page 10). The charges for the service are found in Section D-5.013 (page 22.1).

The September 10, 1974 filing included supporting economic data pursuant to Section 61.38 of the Commission's Rates. On October 9, 1974 (Transmittal No. 18, pursuant to Special Permission No. 7433) MCI filed a clarification to the footnote to Table IV—Circuit Termination Charges to make it clear that the $15.00 per month charge for a local business telephone line would be prorated when shared by a number of MCI customers. No party objected to either of these tariff filings and, as noted above, both became effective on October 10, 1974. The first Metered Use Service marketed when the tariff became effective was Quickline. Execunet service was first marketed late in 1974.

MCI's tariff is organized on a modular framework, rather than in terms of the marketing packages it offers its customers. Each functional component set forth in the tariff is capable of being combined with other components to produce particular services suitable to customers' varying needs. In its marketing efforts, MCI uses terms like "Execunet" to describe particular combinations of tariff elements to be offered to meet particular needs. For example, MCI's standard 4 KHz private lines are marketed as "4K Plus Voice" or "4K Plus Data" though neither term appears in the tariff. This is no different than Bell's marketing its bulk discount private line service under the "Telpak" designation without either using or defining that term in its Tariff FCC No. 260.

AT&T has repeatedly charged—in many forums—that the specialized carriers have not provided innovative services, yet it protests when MCI attempts to offer a new service like Execunet. Just because Bell restricts users of its own foreign exchange service to full-time use from a fixed location at flat-rate charges does not mean that the public should be denied more flexible or lower cost alternatives—or that competitors should be barred from offering such service. MCI permits users of its Execunet service to utilize full-time private line circuits terminating in business telephone arrangements in distant cities on a shared basis. It allows them to access this shared private line network either from their offices or from any push-button telephone in their own exchange area. MCI provides a computerized private line control assembly to connect the customer to a private line serving the city he wishes to reach—MCI now provides that service between fourteen cities—and to account for the time he occupies the channel. The customer is billed at the end of the month for his usage on the basis of the time and distance involved and is given significant information concerning the usage he and his employees have made of the Execunet facilities. Business customers find Execunet a useful and flexible service which is not available from AT&T—the kind of innovation the Commission has looked to the specialized carriers to provide.

AT&T has consistently tried to bar or restrict the development of competition on communications. It opposed new entry in Docket 18920 and later petitioned for a moratorium on further authorization of specialized carrier facilities. AT&T refused necessary interconnections to the new carriers until the Commission and the reviewing court ordered it to provide such facilities. It has thereby limited MCI's geographical extension of its facilities by curtailing its revenues. AT&T is really trying to bar any alternative service which would be cross-elastic with any of its own services by exaggerated claims as to the impact of competition on its revenues. And now—

despite its criticism that the specialized carriers have not provided innovative services—AT&T wants to limit competitors, and the public, to just those kinds of services it has offered all along itself. It even wants everyone else's services tariffed in the same way it handles its own services. But the public wants more flexible and more economical service—and the Commission has staunchly maintained the competitive opportunity it opened up in Docket 18920.

AT&T allows shared use of its private line facilities—including sharing of Telpak for the airline industry, subsidiaries of the same parent corporation, agencies of the United States Government, state and local governments, etc. It, therefore, cannot object to Execunet on the grounds that it involves sharing unless it contends that only large customers of its choosing, and not small businesses, are to be allowed to share. Furthermore, the Commission now has a proceeding underway to explore expanded sharing and resale of communications facilities.

Apparently AT&T's principal complaint is that Execunet can be used as a limited alternative to long distance message telephone service. But the same thing is true of any foreign exchange service—and, indeed, of any private line service—and the results are the same whether MCI or AT&T provides this alternative mode of communications. The only way long distance message telephone service can be sheltered from the effects of its cross-elasticity with other communications services is to prohibit all such alternatives and force everyone to use Bell's DDD network as the exclusive means of intercity communications. However, the Commission has repeatedly found that competition in intercity communications is in the public interest.

Mr. Billingsley complains that an Execunet customer "can use any ordinary exchange telephone (including public coin telephones)" to access MCI's intercity facilities. Of course, the customer pays the telephone company for this use of its facilities just as he pays for all the other

local calls he places. Furthermore, AT&T itself allows large users to dial into their corporate networks from any telephone. Mr. Billingsley also objects that the Bell telephone company in the distant city "has to complete the call as if it were an ordinary local call" but "does not receive any of the usual compensation for completing an interstate long distance call." But he ignores the fact that that company receives its tariffed rate for the business telephone arrangement used to access its exchange area, and that it doesn't receive "any of the usual compensation" when a Bell FX customer calls one of its exchange subscribers from a distant city.

Mr. Billingsley repeatedly says that Execunet service is long distance message telephone service and that MCI has never been authorized to provide it. So far as I know, AT&T has never been authorized by the Commission to furnish interstate long distance message telephone service either, but simply does so by virtue of having constructed facilities and filed tariffs to provide the service. MCI has done the same thing with respect to Execunet, which is clearly different from Bell's universal public switched message service.

AT&T's Tariff F.C.C. No. 263 covers its Long Distance Message Telecommunications Service. Section 2.1.1 describes the scope of the service as follows:

> (A) Long Distance Message Telecommunications Service is that of furnishing facilities for telecommunication between stations in different local service areas in accordance with the regulations and system of charges specified in this tariff. The message charges specified in this tariff are in payment for long distance telecommunications service furnished between the calling and called stations. Long distance message telecommunications service includes See-While-You-Talk Service as set forth in 3.8 following and 50 Kilobit Switched Service as set forth in 3.9 following.

(B) The Telephone Company does not undertake to transmit messages but furnishes the use of its facilities to its customers for communications.

Obviously, MCI's Execunet service does not include See-While-You-Talk Service nor 50 Kilobit Switched Service, nor does it offer telecommunications between all of the more than 20,000 local service areas interconnected by Bell's facilities or provide service anywhere in accordance with the regulations and charges specified in Bell's tariff. Instead, Execunet is a service for business and other similar entities having significant communications requirements between a relatively few communities. While its shared features bring it within the reach of smaller businesses which cannot afford full-time private line service, the costs are beyond the means of all but a very small percentage of the millions of users of AT&T's interstate message telecommunications service (MTS). Execunet customers get no operator assistance, can't get directory assistance in distant cities, can't place conference calls, and can't enjoy other features of Bell's MTS service. They can communicate only to certain designated cities. Execunet is a specialized service customized to fit the needs of business and other similar users. It permits its users to do some of the things they could accomplish through MTS, but they will all have to continue to use the basic MTS service for many, perhaps most, of their communications requirements.

Mr. Billingsley complains that "MCI is promoting its services with those who make a large portion of the toll calls between big cities." That is true in the sense that all of the specialized carriers' services are designed to meet the needs of business and data communications users who have substantial and continuing communications requirements. But I doubt whether these entities, which are limited in number, account for a "large portion" of Bell's toll business between big cities. Mr. Billingsley offers no support for that statement, or for his claim that Execunet "will adversely affect the nation's telephone users." This is simply part and parcel of AT&T's re-

peated, but unsubstantiated, claims that competition—whether from the specialized carriers or the suppliers of terminal devices—will result in increased costs for most communications users. AT&T has not established these extravagant claims anywhere—even in Docket 20003, which was initiated to explore such allegations of economic harm and related issues.

Finally, Mr. Billingsley complains that MCI's tariff does not "adequately describe Execunet service as it is described in MCI's promotional literature or as it is in fact being provided." The simple answer to that is that AT&T's tariffs do not describe its services—MTS, WATS, Telpak, FX, CCSA, etc.—as they are described in its promotional literature or as they are in fact provided. While AT&T does set forth its offerings in great detail, broken down—in the case of private line service—into many different "series", its tariffs deal with the limitations, regulations, rates, etc. applicable to the various offerings and are not couched at all in marketing terms. The same is true of MCI's tariff with respect to Execunet and all the other services MCI offers. That term does not appear in the tariff, nor are the characteristics and advantages of the service described there in language intended to persuade prospective customers to subscribe. But the tariff contains all the components necessary to offer and provide the service, determine the charges therefor, and prescribe the terms subject to which subscribers can use the service. Nothing more is necessary. Execunet service is properly tariffed and is being provided in accordance with the tariff—which was not protested by AT&T or anyone else on a timely basis nor questioned by the Commission on its own motion. It is lawful and in the public interest—and has been well received by the business community as an innovative and efficient communications tool.

Although Mr. Billingsley asks the Commission to "stop" MCI's Execunet service, the request seems almost frivolous. His letter is only a page and a half in length and includes no data whatsoever to support his claims. It was

filed *seven months* past the deadline provided by the Commission's Rules. On the same day, however, AT&T filed an Opposition to RCA Globcom's formal Petition to Reject certain provisions of AT&T's Tariff F.C.C. No. 260 (Transmittal No. 12306). In that pleading AT&T stated:

> "Of the participants at these meetings, only RCA Globcom—*by an untimely pleading* filed *seven days* after the March 18 revisions became effective—seeks to attack those provisions, despite the fact that it had full knowledge of the revisions prior to filing and despite the fact that the revisions were filed on full statutory notice."

Mr. Billingsley simply advances conclusory statements as to the nature of the Execunet service, the adequacy of MCI's tariff, the potential impact of such an innovative competitive service, and his own view of the public interest. Certainly that is not enough to justify or require any Commission action with respect to MCI's Execunet service.

I trust this will serve to respond to Mr. Billingsley's letter.

Sincerely,
BERT C. ROBERTS

MCI TELECOMMUNICATIONS CORPORATION
MCI BUILDING 1150 17th ST. N.W.
WASHINGTON, D.C. 20036

June 9, 1975

Mr. Walter Hinchman
Chief, Common Carrier Bureau
Federal Communications Commission
Washington, D.C. 20554

Dear Mr. Hinchman:

Because I was out of town at the time (having returned just Friday from several days of travel), I asked Bert Roberts to reply to your letter of May 21, 1975, in which you asked us to answer several objections raised by AT&T's Mr. Billingsley regarding our Execunet Service. Bert has done so, I believe, competently and completely, and I do not wish to add anything further to his statement in response to Mr. Billingsley's letter at this time.

I would like to comment, however, on the way the Billingsley complaint was handled and, specifically, on the matter of "lobbying" at the Federal Communications Commission.

Since receiving your letter and that of Mr. Billingsley on May 27, I have been puzzled as to why the letter, which seemed almost casual, evoked such prompt response by the Commission in view of the agency's backlogs, as evidenced by the fact that far more serious matters, such as the problems with joint Telpak and Tariff 260's blatant discrimination in prohibiting interconnection with SCC's, are still waiting for resolution.

Within the last few days, I have received information which, I believe, clears up this puzzle. Apparently, the rather innocuous letter which you forwarded to us was only the tip of the iceberg. AT&T's real objections to Execunet were, it seems, presented forcefully by telephone and in person to members of the Commission and its staff

before the letter was written. Complete with brochures and sophisticated presentation techniques, this effort seems already to have spurred some members of the Commission's staff to pre-judge the matter before MCI has had even the chance to present its side of the story. Obviously, no individual at the Commission could have known, listening to what may have seemed to be simply an informal and purely "informational" presentation, either the carefully-planned nature or the pervasiveness of AT&T's activities or that AT&T planned almost immediately to file a protest against Execunet. These turn out to be the facts, however; facts which deserve to be brought to your attention because they change the nature of this whole dispute.

It seems clear at this point that AT&T has, once again, used (or abused) the administrative process in its continuing fight against competition. While we will be able to deal with this and similar abuses in one way in our antitrust suit, the remedies available in that case will come far too late to provide relief from the present, seemingly continuing, need to spend time and effort vainly attempting to match the personnel and resources of the world's largest corporation, especially since the enormous cost of this kind of "lobbying"—at the Commission, on Capitol Hill, and elsewhere—is borne not by the corporation itself or its shareholders, but by its monopoly customers.

This most recent tactic is typical of the kind of several-fronted war we have had to fight with AT&T ever since we went into business. While AT&T is raising loud cries of harm at the Commission and elsewhere about an MCI service the current gross revenues of which amount to a paltry $19,500 per month, its operating company subsidiaries are delaying the provision of local connections for circuits which will mean over $1 million in monthly gross revenues to MCI *when they are installed.* For example, Pacific Telephone and Telegraph told us just last week, that its previous commitments to supply local connections

—commitments which have been in effect since we began construction of our final link to the West Coast—are not going to be met. This delay will cause the loss of hundreds of thousands of dollars in revenue to MCI, as well as great inconvenience to our customers.

Most frustrating, however, is the fact that in this case, as in so many others, AT&T seems to be trying to win, not on the merits of its argument, but by what I believe is called "deep pocket" strategy. Perhaps the most blatant example of this kind of activity is their effort to pit their unlimited resources against our own very scanty ones by responding to our antitrust suit with a countersuit accusing *us* of "attempting to monopolize" the relevant market.

I am not requesting a hearing on this matter. No need for such time-consuming and expensive procedures has been demonstrated by AT&T. But, I do not want the Execunet matter to be resolved simply on the exchange of letters between Mr. Billingsley and Bert Roberts—especially since AT&T has seemingly already obtained a "hearing" on much more substantial arguments than have been brought to our attention. Instead, I am asking for what seems only fair: That MCI be allowed "equal time" with each of the persons with whom AT&T representatives spoke or corresponded with respect to Execunet.

I appreciate the fact that you will not be able to reply fully to this letter until you have determined the total extent and nature of AT&T's activities, and perhaps have reviewed them with the Commission's general counsel. While you are investigating, I assume that you will immediately request from AT&T the names of all its people who spoke to Commission personnel, either by telephone or in person, about Execunet, the names of the people at the Commission to whom they spoke, the date and length of those conversations, what brochures or other materials were used, the substance of the oral presentations made, and such other pertinent information as you may see fit to obtain. When this information is available, I would

then simply ask that MCI be allowed also to meet informally with each of the people to whom AT&T has made such presentations for an equivalent period of time so that they may at least hear both sides before the Commission takes further action in this area. While we do not wish, once again, to be put in the position of having to endure interminable and expensive hearings simply because AT&T is willing and able to outspend us in its efforts to influence the Commission, we do, nevertheless, wish to be heard on this important matter!

Thank you for your attention to this matter.

Very truly yours,
MCI TELECOMMUNICATIONS CORPORATION

WILLIAM G. MCGOWAN
Chairman of the Board

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY
195 Broadway
New York, N.Y. 10007

T. W. Scandlyn
Assistant Vice President

June 13, 1975

Dear Mr. Hinchman:

This is in response to your request for comments on the letter of June 5, 1975 from Mr. Roberts of MCI to you, concerning Execunet service.

I will avoid a point-by-point discussion of MCI's comments since to do so might divert attention from the real issue in this matter, i.e., *Is MCI authorized to provide Execunet service?*

The keystone of MCI's reply is its assertion that "Execunet is a private line service" (p. 2). Nowhere does MCI claim the right to offer anything other than private line services. Any contention now by MCI of wider authority would be squarely inconsistent with the plain language of the Commission's orders which permit MCI to offer only private line services. (For the Commission's convenience, we attach an Appendix, which includes some citations from Commission decisions and briefs, as well as statements by MCI and by the Courts, which make this limitation clear.)

On April 23 of this year, the Commission, in its brief to the U.S. Court of Appeals in Washington, D. C., stated the differences between "private line service" and "ordinary long distance telephone service." The Commission said:

> " 'Private line service' customers get full-time use of a dedicated circuit or circuits for a fixed periodical charge. The customer has access to continuous com-

> munications without establishing a new connection for each call or message . . . Private line contrasts with ordinary long distance telephone service, in which a toll is charged for each call; and with wide area telephone service (WATS), in which the customer may make an unlimited number of calls for a fixed periodical charge but must establish a new connection for each call as in ordinary long distance service. . . ." (*AT&T* v. *FCC*, No. 74-1953, p. 3, footnote.)

This definition of "private line service" is totally consistent with the definition contained in the Opinion of the U.S. Court of Appeals in New York (*AT&T* v. *FCC*, 487 F.2d 865, 868), wherein that Court stated:

> "Private line service provides the user an exclusive channel for continuous communications between two or more places without the necessity of establishing a new connection for each message";

and each of these comports with the definition contained in Section 21.1 of the Commission's Rules:

> "*Private line service.* A service whereby facilities for communication between two or more designated points are set aside for the exclusive use or availability for use of a particular customer and authorized users during stated periods of time."

Under these clearly enunciated standards, Execunet is not, in fact, a private line service, as MCI contends, but is instead a long distance message telephone service.

What are the undisputed facts as to how Execunet is provided and how MCI's patrons use the service? Execunet is a station-to-station service, offering customers the capability of using *any* telephone provided as a part of local exchange telephone service including any public coin telephone) to call any local exchange telephone in distant metropolitan areas. The charges for each call are

accumulated on a time and distance basis. For each call, the transmission path between the two stations traverses a local telephone company subscriber loop, local telephone company common-user switching and trunking in the originating city, MCI interstate common-user switching and toll trunking, local telephone company common-user switching and trunking in the distant city, and a local telephone company subscriber loop which connects the local telephone company central office to the called telephone. None of the facilities used for any call is devoted solely to calls between the calling and called telephones. Indeed, except perhaps for the MCI facilities (as to which AT&T has no knowledge), none of the facilities is even used for just Execunet service. In the case of *each* call, a new talking path must be set up by the use of network control signalling equipment.

When these undisputed facts are measured against the tests which the Commission and the Courts have applied, it is perfectly apparent that Execunet is a long distance telephone service and not a private line service. Thus, Execunet customers do not have the "exclusive" use of "dedicated circuits;" instead they use circuitry and switching equipment in common with other users. Execunet customers do not pay "a fixed periodical charge;" instead "a toll is charged for each call" (with a minimum monthly charge). Furthermore, Execunet's customers do not have "access to continuous communications without establishing a new connection for each call or message;" instead "a new connection [must be established] for each call."

MCI erroneously claims that Execunet is a private line service because according to MCI it provides "what AT&T calls foreign exchange (FX) service," a service which the Commission has authorized MCI to provide (p. 2). As you know, the Commission's ruling on FX is now pending in the Supreme Court, but in any event, Execunet cannot possibly be confused with FX service.

FX service affords a customer in City A the ability to subscribe to exchange telephone service in a single specific distant city, as if physically located there. FX does this by providing what is denominated in AT&T tariffs as, and was therefore held by the Commission to be, a private line channel between the customer's premises in City A and a central office in the distant city. This channel is dedicated for the exclusive use of the customer. Moreover, it is the *customer* in City A who subscribes to the local exchange service in the distant city and his name and telephone number are listed in the telephone directory for that locality.

The many significant differences between Execunet and FX are apparent. Under Execunet service, unlike FX, the MCI patron does not subscribe to local telephone service in the distant city; similarly, the customer for long distance message telephone service (MTS) does not subscribe to local telephone service in the distant city. Execunet provides service to a choice of cities, just as MTS does, rather than to a single city as is the case with an FX line. In any distant city, MCI uses the local switched message network to complete the Execunet call, just as the telephone companies do in connection with MTS calls. Further, the MCI patron then pays to MCI a single charge covering both the intercity haul and the local hauls in the distant city, which is not the case with FX.

Each of these facts with respect to the service in the distant city is enough to distinguish Execunet from FX. But when there is added to them the further facts that Execunet uses non-dedicated circuitry between the originating station and the called station in the distant city, that a new connection must be established for each call, and that the charges to the customer for access to the distant city are based upon time and distance of the calls actually made, it can be seen that the only resemblance which Execunet, as a whole, bears to FX is that both permit intercity communication. Indeed, the above de-

tails as to Execunet are an apt description of the basic nationwide service which the Bell System has long provided—Long-Distance Message Telecommunications Service.

I believe that the above establishes without doubt that Execunet is not a private line service, as MCI claims, and that MCI's provision of it is unauthorized and unlawful. This is enough, without more, for the Commission to institute prompt enforcement proceedings.

It would be useful to comment very briefly on several of MCI's peripheral assertions. For instance, MCI expresses "surprise" that "AT&T is objecting to the FCC . . . at this late date." AT&T's objection to the provision of an unauthorized service, however, raises public interest questions, as to which any private delay cannot be controlling. MCI cannot simply usurp the authority to provide a service for which it needs Commission permission as it has attempted to here.

In any event, MCI should not be surprised since it did conceal pertinent facts. AT&T, finding MCI's tariff materials confusing and inadequate, wrote to MCI on November 6, 1974, to ask for the pertinent facts (see Attachment A hereto). MCI's response was a request for copies of local exchange tariffs. These were sent to MCI on December 3, 1974. MCI has never supplied any of the facts requested in AT&T's November 6 letter and apparently never intended to do so. In view of MCI's lack of candor, AT&T was forced to conduct its own investigation of the so-called Execunet service when it first surfaced in January 1975 (MCI letter, p. 1), and, unfortunately, that took time. A full understanding of Execunet service had to await our obtaining some of MCI's promotional material since their service could not be understood from their tariff and since they would not supply pertinent facts.

MCI also argues that Execunet is properly tariffed. There are, however, a number of specific areas with respect to Execunet in which the tariff is patently deficient.

The tariff may be "modular" (MCI letter, p. 3), but there is just no way to put together the individual tariff pieces cited at page 2 of MCI's letter so as to describe the Execunet service actually being provided. (For the Commission's convenience, I am enclosing as Attachment B a brochure which MCI is using to promote Execunet.) MCI's tariff clearly violates Section 203 of the Act and the Commission's Rules as to tariff filings.

A further tariff violation arises from the fact that Execunet service is available to call telephones in more than 115 local telephone exchanges in the territories of more than 30 independent telephone companies, none of which is listed in the MCI tariff. This violates Section 61.55 of the Commission's Rules.

In conclusion, may I state emphatically that there is no issue here of an innovative service. Execunet is not innovative; it is actually nothing but message telephone service which AT&T has been providing for decades. MCI's only "innovation" is to offer lower rates to all except occasional and small toll users, inevitably at the expense of the general telephone user. MCI's offering of Execunet, which is message telephone service, is unauthorized and unlawful.

We believe the above facts provide the Commission with the necessary information to institute prompt enforcement action to stop the unauthorized Execunet Service.

Very truly yours,

T. W. SCANDLYN
Assistant Vice-President

ATTACHMENT A

AMERICAN TELEPHONE &
TELEGRAPH COMPANY
195 Broadway
New York, N.Y. 10007

William J. Schindele
Assistant Vice President

November 6, 1974

Mr. L. E. Harris, Vice President
MCI Telecommunications Corporation
MCI Building
1150 17th Street, N.W.
Washington, D.C. 20036

Dear Mr. Harris:

This letter is written on behalf of the New York Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Ohio Bell Telephone Company, The Michigan Bell Telephone Company and the Illinois Bell Telephone Company with regard to MCI's tariff offering of Metered Use Service as set forth in your letter of transmittal and tariff material sent to the FCC on September 10, 1974 and on October 9, 1974.

MCI has ordered exchange business service in New York, Philadelphia, Pittsburgh, Washington, Cleveland, Detroit, and Chicago to be used in conjunction with MCI's metered service. After reviewing the material submitted to the FCC, the Bell System Companies involved believe that MCI's proposed use of Bell System exchange service may violate the resale provisions of their tariffs. We find, however, that the tariff material filed with the FCC relative to Metered Use Service and the use of local exchange service for terminations is inadequate to per-

mit a definitive resolution of this question. It lacks sufficient detail to enable us to determine how the service will operate. We require additional information in order to judge such effect. In addition, since this type of use was not contemplated when exchange equipment was installed and exchange rates were established, it is necessary to consider the effects on rate structures and levels of charges.

In order to pursue our evaluation, we have developed a series of questions, the answers to which are essential for a comprehensive evaluation. We would appreciate your reply to each of these questions in as full detail as possible bearing in mind that our prime concern is the effect of MCI's use of exchange business service on local switching and exchange services.

Your prompt reply will be appreciated.

Very truly yours,
WILLIAM J. SCHINDELE

Questions Related to Metered Use Service
When combined with Bell Exchange Service

1. What are the basic components of MCI's *overall* Metered Use Service, when combined with Bell Exchange Service, that is facilities and equipment, both MCI's and Bell's and how are they interrelated to make up the entire service from calling party to called party?

2. How will MCI's Metered Use Service work when combined with Bell Exchange Service, that is, what are the steps that a calling party will take and how does each of the respective components function as the call proceeds from the calling party to the called party? Also, will the service operate in both directions, that is, could calls be originated at either end?

3. In MCI's view, what is the applicability to this new service of the various limitations under Bell tariffs, both general exchange and interstate, against resale of telephone service?

4. In MCI's view, what is the applicability of this new service to the joint use provision under Bell general exchange and interstate tariffs?

5. Does MCI plan to offer an unlimited calling area in conjunction with Bell exchange business service? If not, what restrictions will be placed on the customer and how will they be accomplished?

6. Does MCI plan to utilize any of the various "extended area service" or "local calling plan" services offered by several of the respective Bell operating companies in conjunction with exchange business service? If so, to what extent?

7. Assuming the service operates in both directions and calls are originated from the exchange network, what procedures will be used to notify, 1) the originating MCI patron of the call progress and 2) the random non-MCI patron who erroneously dials the exchange number of the status of his call?

8. Does MCI contemplate that the service will ever entail business lines at both ends of MCI's intercity facilities?

9. In a number of instances MCI's requests for exchange business lines from the Bell Companies have explicitly requested Touch Tone Service, what is the relation of these requests to the service offering?

10. How will various MCI customers be assigned to the MCI intercity facilities and the Bell exchange business lines, that is, how will customers be grouped and will they be scheduled to specific intercity and exchange facilities or will all customers share all similar facilities in common?

11. Will there ever be any circumstances where an MCI customer in one city will be able to access two or more other cities over a single access facility? If this is contemplated how will it be accomplished?

12. What plans does MCI have to monitor traffic flow on MCI Metered Use facilities associated with Bell exchange business lines and what are MCI's plans to balance such use by groups of customers? What are the expected busy hours by lines or cities and what are the expected CCS (hundred call seconds) or use?

13. On what basis does MCI intend to "prorate" the monthly $15.00 it charges its customers for connections to exchange business service and especially in areas where Bell provides message unit service how does MCI propose to bill the appropriate customer for multiple message unit calls? In a similar vein, how will MCI associate toll charges with specific customers?

14. Does the use of exchange business service provided by the Bell System apply to all of MCI's private line services, that is, Full Time, Part Time, and Metered Use Service? If so, under what conditions?

## EXECUNET SERVICE

EXECUNET SERVICE IS NOW AVAILABLE FROM DALLAS AND HOUSTON. THE RATES ARE AS FOLLOWS:

| | | Rate Per Minute |
|---|---|---|
| DALLAS TO: | Chicago | .28 |
| | Houston | .16 |
| | New York | .41 |
| | Oklahoma City | .15 |
| | Tulsa | .16 |
| | Washington, D.C. | .37 |
| HOUSTON TO: | Chicago | .31 |
| | Dallas | .16 |
| | New York | .42 |
| | Oklahoma City | .20 |
| | Tulsa | .21 |
| | Washington, D.C. | .38 |

EXECUNET SERVICE IS NOW AVAILABLE FROM WASHINGTON TO DALLAS AND HOUSTON. THE RATES ARE AS FOLLOWS:

| | | Rate Per Minute |
|---|---|---|
| WASHINGTON TO: | Dallas | .37 |
| | Houston | .38 |

## EXECUNET SERVICE

### An exclusive offering from MCI

EXECUNET Service, a new, economical private-line communications network is now available to business organizations. This exclusive offering features these immediate benefits:

- Up to one-third reduction in monthly communications expenses to any business organization making calls to distant metropolitan cities on MCI's network.
- Access to EXECUNET may be gained via a local telephone number or from a dedicated facility tied directly to a switchboard or keyset.

- Monthly minimum of $75.00 (plus a connection charge of approximately $30.00) provides a business organization with an around-the-clock private-line network to all the cities served.
- No start-up costs are involved, assuming a standard push-button phone is available.
- No waiting. You can start saving immediately. Service is cancellable on thirty days' notice.

## EXECUNET—EXTRA SAVINGS
### For smaller business phone users

New EXECUNET Service offers the smaller business-phone user his own private-line network at a price he can afford.

For years government and large business establishments have been making intercity calls at low cost by using their own private-line networks. Until now it has not been economical for the smaller user to have his own private-line network, and he has had to use such expensive methods as WATS or standard long distance toll service. EXECUNET now offers all business-phone users an economical alternative.

EXECUNET, which is a private-line network that serves the calling areas of the cities on MCI's network, can be extremely beneficial for those businesses whose calling requirements closely match this network. Small business organizations that use EXECUNET can now effectively manage their communications expenses. For example, unauthorized calls are automatically minimized by EXECUNET's special access code, and a detailed breakdown of EXECUNET call activity will be provided to the customer each month.

## EXECUNET—EXTRA SERVICES
### Designed especially for small businesses

EXECUNET Service is designed to combine maximum economy and convenience for the small business-phone user.

When using EXECUNET, the people in your office simply:

- Dial a local phone number (or in the case of a dedicated facility, dial an extension number).
- Dial your company's authorization code.
- You are now in your EXECUNET private-line network.

Access is permitted twenty-four hours a day, seven days a week from any push-button phone in any business office or public phone booth—as long as your authorized access code is entered.

### How EXECUNET Service is billed *

Subject to a minimum charge of $75.00 per month plus connection charges, subscribers to EXECUNET private-line service are charged based on actual usage. Examples of EXECUNET rates are shown below:

| Service from Washington, D.C. to: | Charge per Minute of Calling Time ($) |
|---|---|
| Philadelphia | 0.14 |
| Pittsburgh | 0.15 |
| New York City | 0.16 |
| Cleveland | 0.18 |
| Detroit | 0.20 |
| Chicago | 0.24 |

* See MCI Tariff No. 1 for full information on rates, terms and conditions.

That's it! There are no long-term commitments and no necessity for special equipment. Compare these rates to your current telephone expenses and you'll see why EXECUNET Service is the most revolutionary communication offering to come along in decades.

MCI Telecommunications Corporation

MCI is regulated by the Federal Communications Commission. MCI has pioneered the concept of competition in the provision of business and data communications service. The MCI network now serves more than twenty major metropolitan areas with a six million channel-mile microwave system. MCI was not only licensed by the FCC to provide a full range of business communications services necessary to meet industry's traditional requirements, but was also chartered to develop new services and markets—EXECUNET is an example of MCI's intention to meet this goal.

Start Saving Today

Call (202) 872-1600 for a personal visit by your MCI representative.

The sooner we talk, the sooner you start saving.

MCI TELECOMMUNICATIONS CORPORATION

COMPARATIVE ANALYSIS OF A 3 MINUTE CALL FROM WASHINGTON—DAY RATES

| Called City | Execunet | Sta-To-Sta Long Distance | Measured WATS Rates | Operator Assisted Long Distance |
|---|---|---|---|---|
| Philadelphia | $0.42 | $0.96 | $0.87 (0.66 O.T.) | $1.40 |
| Pittsburgh | $0.45 | $1.02 | $0.87 (0.66 O.T.) | $1.50 |
| New York | $0.48 | $1.05 | $1.08 (0.81 O.T.) | $1.55 |
| Cleveland | $0.54 | $1.11 | $1.14 (0.87 O.T.) | $1.65 |
| Detroit | $0.60 | $1.14 | $1.14 (0.87 O.T.) | $1.70 |
| Chicago | $0.72 | $1.17 | $1.14 (0.87 O.T.) | $1.75 |
| Dallas | $1.11 | $1.24 | $1.29 (0.96 O.T.) | $1.85 |
| Houston | $1.14 | $1.24 | $1.29 (0.96 O.T.) | $1.85 |

## PRIVATE LINE SERVICE CAN BE MORE ECONOMICAL THAN CONVENTIONAL WATS OR LONG-DISTANCE TELEPHONE SERVICE

### COMPARATIVE RATES FOR DAYTIME CALLS ORIGINATING IN WASHINGTON

| | Execunet | | | | | | |
|---|---|---|---|---|---|---|---|
| | Private Line Service | Sta-To-Sta Long Distance | | Per Minute Equivalent Measured WATS Rates | | Operator Assisted Long Distance | |
| Called City | Per Minute | First Minute | Each Additional | First 10 Hours | O.T. | First 3 Minutes | Each Additional |
| Philadelphia | $0.14 | $0.42 | $0.27 | $0.29 | $0.22 | $1.40 | $0.27 |
| Pittsburgh | $0.15 | $0.44 | $0.29 | $0.29 | $0.22 | $1.50 | $0.29 |
| New York | $0.16 | $0.45 | $0.30 | $0.36 | $0.27 | $1.55 | $0.30 |
| Cleveland | $0.18 | $0.47 | $0.32 | $0.38 | $0.29 | $1.65 | $0.32 |
| Detroit | $0.20 | $0.48 | $0.33 | $0.38 | $0.29 | $1.70 | $0.33 |
| Chicago | $0.24 | $0.49 | $0.34 | $0.38 | $0.29 | $1.75 | $0.34 |
| Dallas | $0.37 | $0.52 | $0.36 | $0.43 | $0.32 | $1.85 | $0.36 |
| Houston | $0.38 | $0.52 | $0.36 | $0.43 | $0.32 | $1.85 | $0.36 |

NOTE: Long distance toll and WATS service provides customers with the flexibility of placing calls to any and all areas within the United States. On the other hand, EXECUNET is a private line service that has been designed to provide the traditional private line economies to customers who call between specific metropolitan areas. EXECUNET private line service can be combined with long distance, toll and/or WATS service to reduce overall communications costs.

NOTE: EXECUNET private line service, unlike long distance toll services, entails a minimal usage charge of $75.00.

# APPENDIX

## STATEMENTS BY MCI, AND FROM COMMISSION AND COURT BRIEFS AND DECISIONS, LIMITING MCI TO PRIVATE LINE SERVICES

From its beginnings, and on innumerable occasions since, MCI has represented to this Commission that it was seeking authority to provide only private line services. It has declared explicitly that it would not provide long distance toll telephone service. Thus in its Comments in Docket No. 18920,* MCI stated:

> ". . . MCI-type applicants propose to *offer only customized point-to-point services* and have no intention of attempting to compete with Bell in *providing local exchange or long distance toll telephone service*, which account for the bulk of Bell's revenues. All of *these are conventional telephone switched voice services, and none of the MCI-type carriers propose such service. . . .*" MCI Comments dated October 1, 1970 in Docket No. 18920, pp. 27-28. (Emphasis added.)
>
> "*The telephone exchange market is not the market which MCI carriers will enter, however.* These carriers will supply a widely diversified number and level of services for individual customers between two or more points between which they wish to transmit intelligence. *No switching between customers is involved. . . .*" *Id.* at 167-68. (Emphasis added.)

The Commission has stated explicitly that its authorization to MCI is to provide private line services. The Commission has also emphasized that MCI did not seek

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* Specialized Common Carrier Services, 29 F.C.C. 2d 870, *reconsideration denied*, 31 F.C.C. 2d 1106 (1971); *affirmed Washington Utilities and Transportation Commission* v. *FCC*, F.2d (9th Cir. 1975).

authority to furnish services like AT&T's MTS. Thus in Docket No. 19896,† the Commission stated:

> "20. . . . In considering this contention we must first take into account the nature of the MCI and Specialized Common Carrier Services proceedings. In the MCI case the applicant was seeking authorization to engage in the business of *providing interstate private line communications services. . . .*" 46 F.C.C. 2d 413, 424. (Emphasis added.)

In Docket No. 18920 (*supra*), the Commission stated:

> "10. According to MCI, the 'real distinction which delineates MCI service from anything provided today by existing common carriers is . . . the manner in which a customer may utilize it to provide a customized *intra-company point-to-point communications system* of his own design and capability.' . . . *There is, MCI says, 'a distinct difference between a public telephone service—which is a natural monopoly—and a customized communications service offered on a private point-to-point basis.'*" 29 F.C.C. 2d 870, 875-76. (Emphasis added.)

In its brief filed with the Ninth Circuit Court of Appeals reviewing Docket No. 18920 ** the Commission again emphasized that its previous authorization to MCI (and other specialized common carriers) was limited to only private line service.
The Commission stated:

> "The Commission's decision in this proceeding to allow competition for the provision of specialized common carrier services by qualified carriers *involves essentially private line offerings as distinguished from local telephone exchange and long distance toll*

† In the Matter of Bell System Tariff Offerings of Local Distribution Facilities, 26 F.C.C. 2d 143, *affirmed, The Bell Telephone Company of Pennsylvania and AT&T* v. *F.C.C.*, 503 F.2d 1250 (3d Cir. 1974), *petition for cert.* pending.

*telephone service. As such the specialized carriers would not compete with the basic interstate public telephone system of the United States, which is used largely for voice communications.*" p. 4. (Emphasis added.)

The Commission brief filed on April 23, 1975 with the D.C. Circuit Court of Appeal in the pending appeal of the grant of United States Transmission Systems, Inc. application,‡ the Commission reasserted that it had not authorized Specialized Common Carriers to provide long distance service:

"The Commission in 1970 had pending a number of applications for microwave radio facilities, which were to be used for specialized common carrier services in various parts of the country. The applicants proposed to offer a wide range of *private line services. . . . They did not propose to offer ordinary long distance service or wide area telephone service* (WATS)." FCC Brief, *AT&T* v. *FCC et al.*, Case No. 74-1953 (April 23, 1975), pp. 3-4. (Emphasis added.)

* * * *

"Similarly, the Eastern District of Pennsylvania in *MCI Communications Corp.* v. *AT&T*, 369 F. Supp. 1004, 1027-28, concluded that the Commission's decision in *Specialized Common Carrier Services* 'was to permit competition in all private line services.' . . . The Court, earlier in the opinion, had defined specialized common carrier service as . . . *synonymous with leased line services, as distinguished from public exchange and long distance service.*" *Id.* at 21-22. (Emphasis added.) (Footnote omitted.)

The Courts, in affirming prior Commission decision made it equally quite clear that they were proceeding on the premise that MCI was authorized to provide *only*

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‡ In Re: *United States Transmission Systems, Inc.*, 48 F.C.C. 2d 859 (1974); *AT&T* v. *FCC et al.*, No. 74-1953 (D.C. Cir. 1975).

private line services. Thus the Ninth Circuit in its review of the decision in Docket No. 18920 stated:

> ". . . The business involved is that of *providing specialized private* or leased *line communications* services through microwave transmission facilities, *as distinguished from public exchange and long distance toll telephone service.* The latter consists primarily of voice communication service from and to all points on an integrated national and international telephone network, available to the public generally. The proposed service consists of communications of all types of signals, including data. . . ." ——F.2d ——. (Emphasis added.)

The Third Circuit in reviewing the decision in Docket No. 19898, likewise understood that only private line services were involved:

> ". . . The Commission first considered *the provision of private line services by specialized common carriers* in *In re Applications of Microwave Communications, Inc.*, 18 F.C.C. 2d 953 (1969) (Docket No. 16509), *reconsideration denied*, 21 F.C.C. 2d 190 (1970). . . . Less than two years later, the FCC conducted a full-scale investigation *into the provision of private line services.*" 503 F.2d 1250, 1254-55. (Emphasis added.)
>
> . . . . .
>
> "Secondly, we note that in assessing the extent to which the established carriers' revenues might be diverted by competition from the specialized carriers, the FCC focused upon the *total revenues earned by the established carriers in private line services. We find this focus to be significant. Implicit in the FCC's evaluation is the assumption that the new entrants will provide services similar to those provided by the established carriers within the rubric of 'private line services.'*" *Id.* at 1260-61. (Emphasis added.)

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

June 16, 1975

Mr. William G. McGowan
Chairman of the Board
MCI Telecommunications Corporation
MCI Building
1150—17th Street, N.W.
Washington, D.C. 20036

Dear Mr. McGowan:

Your letter of June 9, 1975 comments on the manner in which the Billingsley complaint was handled and the matter of "lobbying" at the Commission. This refers to the recent exchange of correspondence between your company, AT&T and this Commission on the subject of your "Execunet" service.

You express puzzlement as to the prompt response by us in view of our backlogs in other areas (those areas you mention relate to formal proceedings, whereas the matter at hand relates to informal correspondence) and you complain about the manner and depth of presentation by AT&T of its views on Execunet to the members of the Commission and its staff.

Your company filed revisions to its Tariff F.C.C. No. 1 which became effective October 10, 1974. Principally those revisions dealt with your metered use service. A series of meetings were held between members of your staff and members of our staff to clarify a number of questions our staff raised concerning the filing. It was our view that your proposed revisions were in need of clarification as required by Part 61 of our Rules. These meetings have continued since that time and it is my understanding that your company has a standing commitment to our staff that an "administrative tariff" was to be filed after June 1.

For these reasons, I do not consider our prompt action in this exchange of current correspondence out of the ordinary. The letter of Mr. Billingsley merely highlighted an important problem area already recognized by members of the staff.

Further, during an informal process, I canot agree with your view that a conversation by a carrier with a member of the Commission or staff automatically entitles another carrier, with an opposing viewpoint, to "equal time". We think the questions posed by AT&T are serious and we are seeking answers to those questions.

As to your point that you wish to be heard on this matter; as you are aware, AT&T has given us its response to your letter of June 5. Upon study of the telephone company's reply, we will determine what course of action to pursue. I trust that this letter serves as a satisfactory reply to you as of this date.

Sincerely yours,

WALTER R. HINCHMAN
CHIEF, COMMON CARRIER BUREAU

MCI TELECOMMUNICATIONS CORPORATION
MCI BUILDING 1150 17th ST., N.W.
WASHINGTON, D.C. 20036

July 1, 1975

Mr. Walter Hinchman
Chief, Common Carrier Bureau
Federal Communications Commission
Washington, D.C. 20554

Dr. Mr. Hinchman:

This is in reply to your letter of June 16, 1975 (which was signed for you by Joseph A. Marino) responding to my letter of June 9, 1975 with regard to AT&T's lobby-

ing at the Commission with respect to MCI's Execunet service. I have been out of Washington for most of the last two weeks and have therefore not had a chance to reply until now.

I am very concerned, in view of trade press reports, that the Commission may act on this matter in the near future, after having really heard only one side of the case. This would not only be unfair to MCI but could have impact on the availability of a desirable new service to the public and on suppliers of the equipment involved —and, indeed, on other service offerings of MCI and other carriers, including Western Union.

I am afraid you have missed the point of my letter. I was *not* referring, in my letter of June 9, 1975, to the exchange of correspondence between MCI, AT&T, and the Commission. Rather, I was expressing concern about what seems clearly to have been a very extensive, off-the-record presentation of AT&T's position to key Commission personnel at a time when AT&T must have known that, if the agency could not be moved to act on its own motion, the Company planned to file a complaint about the matter. I was addressing the fact—of which we keep getting new evidence—that Bell's position on this issue has apparently been completely pre-sold to the Commission and that MCI should be given a corresponding opportunity to present its case. This is no mere open exchange of correspondence but involves an intense effort to influence the Commission without letting MCI even know that its Execunet service was in question. It was followed by Mr. Billingsley's letter which, as I noted in my earlier letter to you, seemed almost casual—and certainly did not fully reflect the representations which had been made to the Commission earlier. It is redress of that lack of balance that I am seeking.

Furthermore, I think you are in error on the facts as to a number of matters touched on in your letter. The question of Joint Telpak has been a "formal" proceeding only since January 20, 1975 if, indeed, the current pro-

ceeding in File No. 3-75 is properly to be classified as "formal". Before that it involved "informal" correspondence and meetings between MCI and AT&T—and finally the Commission. MCI first discussed the matter with members of the Commission's staff some time prior to December 27, 1973, and thereafter wrote to you on January 30, 1974 asking for assistance and concurring in an AT&T suggestion that discussions of the matter proceed "under the aegis of the FCC". A meeting was held at the Commission on July 26, 1974 and you thereafter wrote to AT&T on July 26, 1974 stating your view that "as long as Telpak is available, and the tariff offers such a joint service to the telegraph company, we believe the offering *must* be made equally to other carriers." (emphasis added). After further correspondence and meetings—but no compliance by AT&T—you wrote again on September 18, 1974 requesting Bell to "promptly revise its Series 5000 offering in Tariff FCC No. 260 to offer Joint Telpak arrangements equally to other carriers." Instead of complying with that directive, AT&T again responded, on October 10, 1974, with a series of collateral questions—as it had in reply to your original letter. Three months later, on January 9, 1975, AT&T filed a petition asking the Commission to undertake an inquiry into the Joint Telpak arrangement. On January 20, 1975, the Commission, by public notice, requested interested parties to file comments. Such comments have been filed but the Commission has taken no action—though *Telecommunications Reports* for June 30, 1975 states that staff work is proceeding in the matter. Thus the dispute has been "informally" before the Commission since January 30, 1974—and has been more formally under considerations since January 20, 1975.

The other matter I referred to in my earlier letter—AT&T's discriminatory refusal of certain interconnections—has still not been incorporated into any "formal" proceeding. MCI first raised this matter in a Petition for Investigation filed on October 9, 1974 with respect to

AT&T's Transmittal No. 12171 dated October 7, 1974. The Commission has not yet ruled on MCI's request. AT&T contended that the matter should be resolved in the negotiations in Docket No. 20099, but it later refused to negotiate the restriction in its Tariff No. 260 to which MCI had objected. After the Docket No. 20099 negotiations were concluded, RCA Global Communications, Inc. filed a Petition for Rejection against the same restriction, as well as others. MCI filed comments in support of RCA's petition. The Commission has not yet acted on RCA's request either, so no formal proceeding has been instituted—and MCI, RCA, and the other carriers disadvantaged by the practices complained of have been given no relief. Thus both of the matters referred to in my letter, though informal in nature, were or have been kept pending for a long time before Commission action—and have not been concluded yet.

Your letter refers to meetings held between members of the Commission's staff and MCI personnel with regard to our Transmittal No. 16 which revised our tariff to institute metered use service effective October 10, 1974. Those meetings were most helpful and led to our filing Transmittal No. 18 to clarify the footnote on Page No. 39. Application No. 10, which sought special permission to make the change on not less than one day's notice, read in pertinent part as follows:

> After discussion with the Commission staff it has been agreed that the new material outlined on Table IV, 2nd Revised Page No. 39, should be amended to read as follows:
>
> "'*The charges shown cover dedicated facilities to a customer's premises. In those cases where a customer's requirement is for a local business telephone line as part of an interstate service, and the customer desires that MCI provide such line, a monthly charge of $15.00 per line will apply in lieu of the charges shown above. Payment of

charges incurred for calls dialed through such lines connected to MCI channel is the responsibility of the customer."

I am advised that no other changes in the language of the tariff revisions were requested. As you indicate in your letter, some of the members of your staff stated that our tariff in general, including these revisions—as well as those of AT&T and other carriers—should be clarified, and as a result we have agreed to prepare an administrative glossary that will define certain terms used in MCI's marketing materials but which do not appear in the tariff. We are now finalizing such a glossary and hope to submit it in the near future. We assume that the Commission will require AT&T to do likewise.

However, the conversations about developing a glossary to clarify matters began some time before MCI began marketing the Execunet service, and our early discussions did not involve Execunet at all. They dealt, rather, with your staff's concern over the fact that MCI's tariff does not contain definitions or explanations of "4K Plus Voice," "FX," "CCSA," and other terms used in marketing our services. This is because, as is explained in Mr. Roberts' reply to Mr. Billingsley, our tariff is constructed on a modular basis rather than in terms of the marketing packages we offer our customers. We want very much to retain that tariff approach because of the flexibility it gives us in serving our customers' needs. We have been told by your staff that they understand this but think a glossary will serve as a bridge between the specific services as they are marketed and the general, modular components set forth in the tariff. We will be happy to comply with their request.

But you are entirely mistaken when, on the basis of the discussions referred to above, you say: "The letter of Mr. Billingsley merely highlighted an important problem area already recognized by members of the staff." Mr. Billingsley did not complain that MCI's tariff provisions as to Execunet are unclear—instead, he objects that

we are not authorized to provide the service. On the contrary, the Commission's staff, as noted above, thought that a glossary of marketing terms—later expanded to include "Execunet," Quickline," etc.—would be helpful, *but they never raised any questions about the nature or legality of Execunet when we briefed them about it at the time of its introduction to the public.* So Mr. Billingsley's concerns originated with him and others at AT&T—though they seem to have raised doubts in the minds of some at the Commission to whom we had not considered it necessary to explain the new service, but to whom we would now like an equal opportunity to state our case.

You close by saying:

> "Further, during an informal process, I cannot agree with your view that a conversation by a carrier with a member of the Commission or staff automatically entitles another carrier, with an opposing viewpoint, to 'equal time'."

I used the phrase "equal time" in the sense that I believe we are entitled, in any kind of equitable disposition of this important matter, to a comparable opportunity to present our side of the case before the Commission takes any action which might embark us all upon the kind of lengthy and costly proceeding to which I referred in my letter. Such action would play into AT&T's "deep pocket" strategy because, regardless of the eventual outcome, it would subject MCI to further useless expense and effort and divert our resources from the vital task of establishing ourselves as a viable entity capable of realizing the Commission's objectives in authorizing the entry of new carriers.

I take it that you do not mean to say that we are not entitled to *any* opportunity to present our "opposing viewpoint" during what I assume is still "an informal process." My purpose in writing to you on June 9, 1975 was to assert our right to some response in addition to Mr. Roberts' letter, which could reply only to Mr. Billingsley's very brief and unsubstantiated letter. I sought your as-

sistance in finding out who from AT&T had talked to whom at the Commission and for how long. We need that information to know whom it would be appropriate to ask for an opportunity to state our case—and the scope of presentation that would be appropriate. I also requested your help in getting copies of any materials the AT&T people may have used and a summary of the oral presentations they made because we need that information to know to what it is we are to respond. Procedural fairness would seem to require no less!

I agree that informal discussions between carriers and Commission personnel are desirable and often necessary. But I think the pervasiveness and depth of the presentations AT&T must have made in this case, on the eve of a planned filing, make this a different matter. I say this because it is obvious from statements made by Commission personnel that AT&T's arguments have had such impact that they have clearly gone beyond normal discussion of problem areas with the Commission and amounted to an all-out adversary presentation—one which is not reflected in Mr. Billingsley's letter and which we cannot meet without being advised of the arguments AT&T made and being given a fair chance to meet with the same people to present our case in rebuttal.

We are preparing a detailed reply to Mr. Scandlyn's letter of June 13, 1975. This is taking some time because we intend to answer it point-by-point and to avoid the kind of generalizations Mr. Scandlyn has used. Meanwhile, we would like to make these very preliminary points:

(1) Section 21.705 of the Commission's Rules provides that:

> "Stations in this service [the Point-to-Point Microwave Radio Service] are authorized to render any kind of communication service provided for in the legally applicable tariffs of the carrier, unless otherwise directed in the applicable instrument of authorization. . ."

(2) In its comments filed in Docket No. 19117, in which the Commission proposed to adopt rules which would require a carrier to get Commission approval before offering a new service, AT&T said:

"20. A very significant and harmful aspect of the proposed new rules is the extent to which they would curtail or supplant the exercise of the carriers' managerial functions, functions which are of long standing and codified in the Communications Act. The right to initiate and file new or revised classifications of service, like the right to file rates, is a fundamental prerogative of management, limited only by the requirement that such rates and classifications must be just, reasonable, and nondiscriminatory, *i.e.*, that they must meet the statutory standards of lawfulness. This has been clearly stated by the Supreme Court in interpreting the Interstate Commerce Act from which the regulatory scheme of the Communications Act was drawn.

> 'It must be remembered that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager. As said in *Int. Com. Com.* v. *Ala. Mid. R. R. Co.*, 168 U.S. 144, 172, quoting from the opinion of Circuit Judge Jackson, afterwards Mr. Justice Jackson of this court, in *Int. Com. Com.* v. *B. & O. R. R. Co.*, 43 Fed. Rep. 37, 50:
>
> ' "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvan-

tage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits."' *Interstate Commerce Comm'n* v. *Chicago G. W. Ry.*, 209 U.S. 108, 118-19 (1907); see also *Missouri ex rel. Southwestern Bell Tel. Co.* v. *Public Service Comm'n*, 262 U.S. 276, 289 (1922).

"25. The rule changes which the Commission proposes to adopt in this proceeding would be in direct conflict with the statutory scheme under which carriers are free, under § 204 of the Act, to initiate 'any new charge, classification, regulation or practice' by filing a tariff therefor which, subject to the Commission's power of suspension of a maximum period of three months, must be allowed to go into effect unless found, after a hearing, to be unjust, unreasonable, or otherwise unlawful. . . ."

"32. Clearly these proposed rules are antithetical to the statutory scheme and legislative policy outlined above. No longer could a carrier initiate a new service classification or subclassification by filing a tariff with the Commission as authorized by §§ 203 and 204 of the Act. Instead of imposing on the protestants of a new service classification or subclassification the burden of proving it unlawful under § 204 of the Act, the Commission would require a preliminary burden of justification by the carrier. Instead of judging the new filing solely by the standards of lawfulness provided by §§ 204 and 205 of the Act, the Commission would use as its criteria

"public interest, convenience and necessity." (Notice, para. 9) Thus, the Commission could pick and choose among new service offerings and reject those it found were not 'in the public interest.' This it lacks statutory authority to do."

In closing out that proceeding without adopting any rule, the Commission said:

". . . we recognize that the termination of the rule-making proposed herein will make it possible for domestic carriers, as a general rule, to offer new classes or subclasses of communications service over duly authorized facilities merely by the filing of appropriate tariff revisions properly supported by the cost and other data required by Part 61 and otherwise in conformity with our rules. . . ."

(3) MCI duly filed tariff changes last fall which offered a basic metered use service—which is a component of *other* services besides Execunet. No one protested the filing—and *there is, as yet, no written protest sufficient to justify any action with respect to this tariff provision.*

(4) Datran's basic service is a *switched* data service which cannot, by any stretch of the imagination, fit into AT&T's narrow definition of private line service. Western Union offers Hotline, which it presumably classifies as a private line service although its customers do not have dedicated intercity circuits but share a group of intercity private lines—just as the subscribers to Execunet do.

(5) Southern Pacific offers a measured time service, charging subscribers only for actual usage. This can be coupled with a business telephone arrangement in a distant city (such as is used in providing FX service) in order to provide a service very like Execunet.

(6) Composite Data Service Vendors provide a switched service for which they charge in proportion to usage. Are they to be given greater privileges than MCI simply because they lease facilities from AT&T—and are therefore dependent upon it for their continued existence?

(7) In short, the specialized carriers cannot be confined within AT&T's definition of private line service. It would be unconscionable to allow one competitor to confine another to business areas determined by the former. Before allowing anything of this sort, perhaps the Commission would want to consult with the Antitrust Division of the Department of Justice. The Commission rejected AT&T's narrow definition of private line service in Docket No. 19896 and required interconnection not only for the specialized carriers' presently authorized services but for services authorized "hereafter." In the rapidly changing world of communications, the Commission should preserve that flexibility for the new carriers—and the public.

(8) Many of the aspects of Execunet to which AT&T apparently objects are available to any user of FX or CCSA—whether from AT&T or MCI—who has a PBX switchboard. The FCC classifies this as private line service.

(9) Execunet is a new service—AT&T doesn't offer it. For example, it gives the customer a detailed accounting of calls placed, identified by caller, which Bell can't provide without requiring use of costly operator assistance. The service is valued by its users and is in the public interest.

This is only a very hurried statement of some of the points we want to make to the people who heard AT&T's presentation. The present and foreseeable impact of Execunet on AT&T is *de minimis*, so there is no

need for hasty action—especially since the Commission is not in a position to make a rational decision based on full presentation of both sides of the case. This should be permitted before the Commission takes any action, since whatever it may do on partial information seems likely to have serious impact on many parties of whom MCI is only one.

I hope that, on the basis of the above you will use your good offices to facilitate the kind of fair consideration of this matter we are asking—and which I believe the law requires.

Execunet, like Quickline, is a valid service being furnished under a legally filed tariff. These two services, which are both offered under the metered use provision of MCI's tariff, are expected to yield $100,000 in revenue this month—of which Execunet will account for more than $30,000. Despite AT&T's efforts at imposing the kind of contrived and managed competition it has heretofore so often deplored, MCI intends to use all available means to preserve effective competition in the provision of its innovative private line services, including Execunet.

Very truly yours,

WILLIAM G. MCGOWAN
CHAIRMAN OF THE BOARD

## APPENDIX C

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

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No. 74-1229

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AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL., PETITIONERS,

*v.*

FEDERAL COMMUNICATIONS COMMISSION, ET AL., RESPONDENTS

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT
MCI TELECOMMUNICATIONS CORPORATION
IN OPPOSITION

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Respondent MCI Telecommunications Corporation ("MCI")[1] hereby submits its brief in opposition to

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line services field indicates that FX and CCSA were encompassed within Docket No. 18920. Thus, since the

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[1] Both MCI Telecommunications Corporation and its sister subsidiary, MCI-New York West, Inc., participated fully in the proceedings below. MCI-New York West, Inc., however, has been recently merged into MCI Telecommunications Corporation. "MCI" is utilized throughout this brief to describe either MCI Telecommunications Corporation or the MCI group of affiliated companies.

rulemaking itself went to the totality of competition in the provision of all private line services (Issue "A"), the generalized interconnection inquiry (Issue "E") also went to the totality of private line services, including FX and CCSA.[23] (503 F.2d at 1260, Pet. App. 19a)

(2) The Commission, in its decision in Docket No. 18920, considered the possibility of "total diversion" of AT&T's private line revenues as a result of the competition from the specialized carriers. This indicated the Commission's assumption that the new entities would provide services similar to the private line services being furnished by the established carriers. Since FX and CCSA account for a substantial share of AT&T's private line revenues, the reference to total diversion indicates that FX and CCSA were within the Commission's contemplation: (503 F.2d at 1260-61, Pet. App. 19a-22a)

(3) The Commission's directive that it contemplated "full and fair competition in the specialized field among all carriers, both established and new. . . ." [24] indicates that the Commission intended to authorize the new carriers to provide all elements of the private line services then being furnished by the established carriers, rather than an incomplete "package" of private line services. The Commission's finding that the provision of interstate private line service should be on a full, fair and nondiscriminatory basis would be meaningless without the provision of the full range of private line services. (503 F.2d at 1261-62, Pet. App. 22a-23a)

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(4) The narrow interpretation sought by petitioners here would frustrate the basic objectives enunciated in the Docket No. 18920 proceeding, in which the Commission repeatedly used the generic term "private line service",

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[23] As set forth at p. 5, *supra*, it is important to note that AT&T itself classifies FX and CCSA as private line services.

[24] 29 FCC 2d at 916 (1971).

which put AT&T on notice that it would be expected to provide interconnections for the full range of such services. The denial of interconnection facilities for the specialized common carriers similar to those provided to AT&T's "affiliated carrier", the Long Lines Department, would place them at a definite disadvantage in obtaining customers and frustrate the Commission's objectives in authorizing entry by the specialized carriers. (503 F.2d at 1262, Pet. App. 23a)

The "evidence" set forth by AT&T in opposition to this conclusion is slim indeed. In order to attempt to rebut the well-reasoned conclusions of the lower court, petitioners rely on ambiguous statements made in Commission briefs in related Ninth and Second Circuit proceedings and on a statement taken out of context from the decision of the court below.

Petitioners (Pet. Brief p. 28) make much of a statement in the Commission's brief filed in the Ninth Circuit, which later affirmed the Commission's decision in the *Specialized Common Carrier Services* case, *Washington Utilities and Transportation Comm'n* v. *FCC*, Nos. 71-2919 and 72-1198 (9th Cir. Jan. 20, 1975), *rehearing denied*, March 12, 1975. The Commission's brief contained the statement that the *Specialized Common Carrier Services* decision did not contemplate interconnection of the specialized common carriers into

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 74-1953

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AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
APPELLANT,

*v.*

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE.

MCI TELECOMMUNICATIONS CORPORATION, and
UNITED STATES TRANSMISSION SYSTEMS, INC.,
INTERVENORS.

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# BRIEF FOR INTERVENOR MCI TELECOMMUNICATIONS CORPORATION

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## STATEMENT OF ISSUE PRESENTED

Whether the Federal Communications Commission, in applying its *Specialized Carrier* policy in favor of full competition in the specialized communications field, abused its discretion in granting the USTS applications.

## COUNTERSTATEMENT OF THE CASE

MCI Telecommunications Corporation (MCI) adopts the Counterstatement contained in the brief of the Federal

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Communications Commission. MCI, however, wishes to focus the Court's attention on certain aspects of the factual background of this case.

AT&T's Petition to Deny the USTS applications was part of the broadscale collateral attack on the FCC's decision in *Specialized Common Carrier Services*, 29 FCC 2d 870, *reconsideration denied*, 31 FCC 2d 1106 (1971), *aff'd sub nom. Washington Utilities & Transportation Commission* v. *FCC*, Nos. 71-2919, 72-1198 (9th Cir., decided Jan. 20, 1975).[1] In the *Specialized Carrier* decision, the FCC had concluded that the public interest would be served by permitting new competitive entry in the specialized communications field. AT&T's Petition to Deny the USTS applications, dated October 4, 1973, was filed concurrently with a Petition which "request[ed], *inter alia*, that the Commission defer granting *all* pending and subsequently filed specialized common carrier applications pending the holding of an evidentiary hearing to permit the Commission to reassess the question of whether the continued grant of such applications will in fact serve the public interest." AT&T Petition to Deny, p. 1 n. 1 (A. 98) (emphasis added). AT&T "requested that both the substance of the relief requested in said Petition be considered by the Commission in

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mischaracterization of the *Specialized Carrier* decision that AT&T can argue that the application of the policy in favor of competition in the present case "represents a patent departure" from the *Specialized Carrier* decision.

As AT&T would have it, the Commission's *Specialized Carrier* decision "rested directly upon a finding that new specialized carriers would primarily provide new services

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[1] The *Specialized Carrier* decision applied to terrestrial microwave carriers providing private line services in competition with AT&T. Subsequently, the Commission extended its policy in favor of competitive entry to new satellite carriers. *Establishment of Domestic Communications Satellites by Non-Governmental Entities*, 35 FCC 2d 844 (1972). *See Network Project* v. *FCC*, No. 73-2050 (D.C. Cir., decided April 18, 1975).

and create new markets and would not significantly divert traffic from existing carriers." That is simply not true. Contrary to AT&T's contention that the "express rationale" of the *Specialized Carrier* decision hinged primarily on a guarantee of "new and different services," the Commission's principal holding in the case shows that the *Specialized Carrier* policy is one of favoring the entry of *new carriers* in *all* private line services. The Commission held as follows, 29 FCC 2d at 920 (emphasis added):

> We find that: there is a public need and demand for the proposed facilities and services and for *new and diverse sources of supply*, competition in the specialized communications field is reasonably feasible, there are grounds for a reasonable expectation that *new entry* will have some beneficial effects, and there is no reason to anticipate that *new entry* would have any adverse impact on service to the public by existing carriers such as to outweigh the considerations supporting *new entry*. We further find and conclude that a general policy in favor of the *entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity*.

The "policy in favor of the entry of new carriers in the specialized communication field" was viewed as one of the two "basic determinations" in the matter by the Ninth



Circuit in *Washington UTC*, *supra*, slip op. at 2, and as the "primary issue" by the Third Circuit in *Bell* v. *FCC*, *supra*, 503 F.2d at 1270.

The Third Circuit opinion shows further error in AT&T's contention here that the *Specialized Carrier* decision was aimed primarily at promoting "new services" and discouraging "duplicative facilities." In passing on

the question of the extent of competition authorized by the *Specialized Carrier* decision the court noted the Commission's statement that "we do contemplate *full* and fair competition in the specialized field among all carriers, both established and new. . . ." 503 F.2d at 1261, *quoting* 29 FCC 2d at 916 (emphasis added). The court stated, 503 F.2d at 1261-62:

> Given this objective of *full* competition, it is difficult to understand why the Commission would authorize the new carriers to offer an incomplete "package" of private line services. In the absence of any suggestion to the contrary, we read the "full competition" mandate as an indication that *the Commission intended to authorize the new carriers to provide all elements of private line services theretofore furnished by the established carriers.* (emphasis in the second sentence added)

More importantly, the court's opinion specifically rejected AT&T's "new services" reading of the *Specialized Carrier* decision, stating, *id.* at 1262, that: "While there is language in Docket 18920 indicating a concern with new, customized services, we interpret this language as referring not only to the types of services provided, but also to the delivery of private line services to ultimate customers who theretofore had been unable to obtain private line services



fashioned to their particular needs."

The *Specialized Carrier* policy is based on the provision of *all* private line services by *new carriers*, thus assuring *full* competition among all carriers, both established and new. Contrary to AT&T's claim, the Commission's action here is not a departure from the *Specialized Carrier* policy, but rather an application of that policy. It is AT&T which is pressing for a departure from the policy of full competition. As the Commission stated in its order: "We

do not believe the circumstances surrounding the instant applications are sufficient to warrant reevaluation of the open entry policy promulgated in that proceeding." 48 FCC 2d at 860 (A. 282).[6]

The Court has recently affirmed the FCC's grant of authorization to American Satellite Corp. and to RCA Global Communications, Inc./RCA Alaska Communications, Inc. for the provision of specialized communications services via satellite in *Network Project* v. *FCC*, No. 73-2050 (D.C. Cir., decided April 18, 1975). By virtue of the grants affirmed by

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principal issues treated in the *Specialized Carrier* proceeding was spectrum conservation and frequency and route coordination. The decision speaks for itself as to the sufficiency of the Commission's hearing and disposition of that highly technical issue. *See* 29 FCC 2d at 927-36.

AT&T's third allegation is that the USTS system may divert up to $30.5 million of AT&T's private line revenues annually and that this presents a material factual issue which requires an evidentiary hearing.

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[6] Aside from the above general reaffirmation of the *Specialized Carrier* policy and the refusal to depart from it in the instant case, there is a clear recognition in the Commission's decision here that the grant of the USTS applications is simply a part of the development anticipated in the expert forecasts and judgments made in the *Specialized Carrier* decision. There the Commission discussed the financial risk aspects of the new competitive policy, and noted that possible mergers and changes of service suppliers were part of a "reasonable price to pay for competitive options." 29 FCC 2d at 922. Here the Commission took note of its prior forecasts and the "effective screening mechanism of the risk capital money market" and found that "ITT's proposed entry into the field is not inconsistent with this 'shake out' period which represents, we believe, the natural outgrowth of the competitive policies developed for specialized common carrier services." 48 FCC 2d at 861 (A. 283).

In the *Specialized Carrier* case, the Commission rejected this notion that "there could be any diversion of revenues of a magnitude to have the impact claimed by AT&T, in view of the very small percentage of AT&T's existing total market that is vulnerable to competition of the kind proposed here, the growth rate of Bell's basic services, and the likelihood that AT&T would obtain a very substantial share of the potential market for specialized services." 29 FCC 2d at 910. As to the share of AT&T's total market, where private line diversion might occur, the Commission found that only about 4 percent of total Bell system revenues comes from interstate private line services that would be subject to competition, and that the percentage would not appreciably increase over the decade even with the expected fourfold growth of the existing plant of the Bell system. *Id.* at 911. Next, the Commission found that any diversion would not be significant because of the rapid growth and specialized needs of the private line market,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 74-1386

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THE BELL TELECOMPANY OF PENNSYLVANIA
AND
THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
PETITIONERS,

*v.*

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA,
RESPONDENTS.

MCI TELECOMMUNICATIONS CORP., ET AL.,
INTERVENORS.

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On Petition for Review of a Decision
of the Federal Communications Commission

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Brief for Intervenors
MCI Telecommunications Corporation and
MCI-New York West, Inc.

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## JURISDICTION

This proceeding is brought pursuant to 28 U.S.C. §§ 2341-50 and Section 402(a) of the Communications Act, 47 U.S.C. § 402(a), which establish this Court's jurisdiction. The Decision of the Federal Communications Commission sought to be reviewed constitutes final agency action.

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even if its applications were granted. The concentration, therefore, was on such interconnection services. (A. 1124-25)

(b) *The Specialized Common Carrier* proceedings involved rulemaking for the determination of basic policies with respect to the provision of private line service by all the specialized carriers.[22] FX

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[22] Petitioners (Pet. Br., p. 36) refer to the Commission's brief in the Ninth Circuit in *Washington Utilities and Transportation Comm.* v. *FCC*—the appeal from the Commission's *Specialized Common Carrier* decision. They argue that the concession is made in that brief that the *Specialized Common Carrier* decision did not contemplate interconnection of the specialized common carriers into the switched network. As has previously been pointed out (p. 28, n. 15, *supra*) the appeal in the Ninth Circuit did not involve the matter of interconnection. *The brief's reference to interconnection*

and CCSA were not specifically mentioned because the Commission was concerned with private line services generally and did not focus on any specific form of service. However, it is clear that FX and CCSA were directly involved from the fact that Bell in its comments in that proceeding specifically listed FX as a private line service and CCSA as equipment available to its private line customers and has consistently classified FX and CCSA as private line services in its tariffs and other documents. Moreover, the Commission in its Decision in Docket No. 18920 considered the possibility of the "total diversion" of Bell's private line revenues as a result of the competition offered by the specialized carriers. Since FX and CCSA account for a substantial share of Bell's total private line revenues, the reference to total diversion would have been meaningless if FX and CCSA were not to be included in the specialized carriers' service offerings. There is no distinction in principle to separate FX and CCSA services from other types of interconnection. (A. 1125)[23]

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*was thus somewhat gratuitous and entirely peripheral to the issues raised on appeal.* In any event the Commission in its Decision in Docket No. 19896 (A. 1125, n. 14) instructed its counsel to forward a copy of the Decision to the Ninth Circuit to dispel any ambiguity that the brief may have created. Petitioners (Pet. Br., p. 37) also refer to a statement in the Commission's pleading the Second Circuit case (which was an appeal from the Commission's letter order of October 4, 1973). In his brief the General Counsel said that the Commission *could* rule in Docket No. 19896 that it was never its intention to allow MCI to provide FX or CCSA service or that there had been no Section 201(a) hearing The Show Cause Order initiating *this* proceeding included an issue as to whether "the Commission has heretofore ordered the telephone companies, pursuant to Section 201(a) of the Communications Act, to provide interconnection with MCI. . . ." (A. 140); the statement simply set forth an academically possible result. That possibility of course did not eventuate.

[23] Petitioners (Pet. Br., pp. 35-36) seek comfort in a line of questions propounded by Commissioner Wiley during the oral argu-

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(c) The October 4, 1973 letter order did not specifically refer to FX and CCSA but did cover "*all* of the authorized services of the specialized carriers." (emphasis added) The directive in that letter requiring the telephone companies to honor requests for interconnection facilities required by the specialized carriers to terminate the services they are authorized by the Commission to furnish was certainly broad enough to encompass interconnection for FX and CCSA services. (A. 1125)

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(d) The narrow interpretation which Bell seeks to place on the previous rulings would be inconsistent with the basic objectives enunciated in those proceedings. In each of the proceedings action was taken to assure that the provision of interstate private line service would be on a full, fair and nondiscriminatory basis [24] and that the

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ment in Docket No. 19896, in which he inquired as to why FX and CCSA were not specifically mentioned in the *Specialized Common Carrier* proceeding. The short answer to Petitioners' point is that these are the types of questions frequently used to elicit information and to bring disputed isues in focus. Commissioner Wiley's questions were answered during the oral argument (A. 926-27; A. 931-32), and he was obviously satisfied since he voted in favor of the Decision, which interpreted the order in the *Specialized Common Carrier* proceeding as comprehending FX and CCSA.

[24] In Docket No. 18920 the Commision made it clear that AT&T, Western Union and other existing carriers would have an opportunity to compete with new entrants on the merits of their own service offerings and facilities, that there should not be any protective umbrella for new entrants, and that competition in the specialized field should be full and fair among all carriers, both established and new (29 FCC) 2d at 913-14, 915, 916). The policy thus enunciated does not restrict the scope of AT&T's activities. AT&T would, however, have it operate as a one way street, in its favor, but not for the benefit of the specialized carriers. In other words,

> specialized carriers would not be excluded from the market by reason of monopoly control by Bell and other telephone companies over essential local distribution facilities. Such interconnection is provided by the telephone companies to the Long Lines Department and to more than 1,700 independent telephone companies to enable them to provide FX and CCSA services. The denial of similar facilities to the specialized carriers would place them at a definite disadvantage in obtaining customers and would frustrate the objectives sought to be achieved by the authorizations granted to the specialized carriers by the Commission. (A. 1127)

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The Commission's second answer to Petitioner's contentions that FX and CCSA were not contemplated by its prior orders, is, that even though the matter had been fully and clearly provided for by earlier determinations, the Commission nevertheless proceeded in Docket No. 19896 to address itself to the arguments strenuously advanced by Bell that substantial and significant differences exist between interconnection for FX and CCSA and interconnection for other private line services [25] and that by

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it wants to complete with respect to any new services the specialized carriers may develop but seeks to exclude the specialized carriers from a substantial part of the basic private line market.

[25] In light of this argument it is ironic to note that Bell is somewhat less than consistent in its position. In the mandamus proceeding in the District Court for the Eastern District of Pennsylvania (369 F. Supp. 1004) the record shows that not only did Bell refuse to interconnect for FX and CCSA but likewise refused interconnection for "interexchange service"—clearly not a switched service even by Bell's definition. In that case AT&T indicated that such interconnection would be available only if and when the Commission approves AT&T's Hi-Lo tariff. The approval of the tariff has no bearing whatsoever on MCI's right to interconnection—it may relate to the economics of competition. (See 369 F. Supp. at 1009-10.)

reason of these differences an evidentiary hearing is essential. The Commission addressed itself specifically to the reasons asserted to require such an evidentiary hearing and found that no basis existed therefor. Its findings may be summarized as follows:

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III.

## THE COMMISSION'S ORDER IS CLEAR AND PRECISE. IT IS NOT OVERBROAD.

The Commission in its Order has directed the Bell companies to furnish to MCI and other specialized common carriers the interconnection facilities essential to the rendition of all of their presently or hereafter authorized interstate and foreign communications services. (A. 1146-47) Petitioners urge (Pet. Br., pp. 46-50) that aside from interconnection for FX and CCSA the obligation imposed by the Commission is wholly undefined and unrestricted—that the Decision offers no guidance whatever as to the character or extent of any additional services to which the interconnection obligation may be intended to extend. They charge that the Order is impermissibly sweeping.

Petitioner's argument is specious—there is no problem of overbreadth in the Commission's Order. For while it is correct that the Commission's language requires Bell to permit physical connections "essential" for "all" of the private line services which any of the specialized carriers are now or may "hereafter" be authorized to offer, the obligation is qualified and limited by the duty set forth in the Decision that such interconnection facilities must be "*similar to these presently provided to Bell's Long Lines Department on a non-discriminatory basis.*" (A. 1146) Similarly, while it is also true that the Decision orders Bell to cease and desist from "any conduct" which may result in denying or delaying physical connections for any

such services now or "hereafter" authorized, this obligation is limited by the concurrent obligation imposed on Bell to cease and desist from "denying to MCI or any other carrier party reasonable interconnection services similar to those provided to the Long Lines Department of the American Telephone and Telegraph Company in connection with the authorized interstate and foreign communications services of such other carriers." (A. 1146)

MCI and the other specialized carriers have asked the Commission *only for equality of treatment with the Long Lines Department*, Western Union and the independent telephone companies, and the Commission has reiterated the necessity for equal treatment again and again throughout these proceedings. The interconnection obligation imposed by the Decision in Docket No. 19896, as had been made clear by the various prior proceedings, goes to fair competition, and competitive equality of opportunity with respect to interconnection as a necessary corollary to the basic public interest finding in Docket No. 18920 authorizing specialized common carriers to compete in the private line field. This is illustrated by the fact that in the *Notice* in Docket No. 18920, the Commission stated (24 FCC 2d at 347):

> "In other words, where a carrier has monopoly control over essential facilities we will not condone any policy or practice whereby such carrier would discriminate in favor or [sic] an affiliated carrier or show favoritism among competitors." (Footnote omitted)

In the *Specialized Common Carrier* decision, the Commission stated (29 FCC 2d at 940):

> "We reaffirm the view expressed in the *Notice* (paragraph 67) that established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new car-

riers, and also afford their customers the option of obtaining local distribution service under reasonable terms set forth in the tariff schedules of the local carrier. Moreover, as there stated, 'where a carrier has monopoly control over essential facilities we will not condone any policy or practice whereby such carrier would discriminate in favor of an affiliated carrier or show favoritism among competitors.' " (Footnote omitted)

In the October 4, 1973 letter order, the Commission stated (A. 29):

"[O]ur *MCI* and *Specialized Common Carrier* decisions made it clear that Bell System companies and other established carriers which have monopoly control of exchange facilities would be expected to provide, on reasonable terms and conditions, interconnection of such facilities as required by the specialized carriers to terminate the services which such

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## APPENDIX C

## UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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SEPTEMBER TERM, 1976

No. 75-1635

[Filed Aug. 22, 1977]

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., and N-TRIPLE-INC., PETITIONERS

*v.*

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN TELEPHONE AND TELEGRAPH CO., ET AL., INTERVENORS

BEFORE: Wright, Tamm and Wilkey, Circuit Judges.

ORDER

Upon consideration of the motions of respondent Federal Communications Commission and of intervenor American Telephone and Telegraph Company to stay the issuance of the mandate in this case pending applications to the Supreme Court of the United States for writs of certiorari, of the oppositions thereto and of the reply of respondent Federal Communications Commission, it is

ORDERED, by the Court, that the motions of respondent Commission and of intervenor Company both are granted to the extent that the Clerk is directed not to issue the mandate herein prior to September 19, 1977.

*Per Curiam*

For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

## APPENDIX D

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151-609.

### § 151 Purpose of Act; Creation of Federal Communications Commission

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

### § 154 Provisions Relating to the Commission

* * * *

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No Commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission

shall be entered of record and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

**§ 204 Hearing as to Lawfulness of New Charges; Suspension**

(a) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or an increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or increased charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund,

with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, the burden of proof to show that the increased charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an oportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a).

**§ 205 Commission Authorized to Prescribe Just and Reasonable Charges**

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter ob-

served, and what classification, regulation, or practice is or will be just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

**§ 208 Complaints to the Commission**

Any person, any body politic or municipal organization, or state commission, complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said

complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complaint.

**§ 214 Extension of Lines**

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: provided, that no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under Section 221 or 222 of this Act: provided further, that the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equip-

ment, other than a channel of communication established by the interconnection of two or more existing channels: provided, however, that nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of Defense, the Secretary of State (with respect to such applications involving service to foreign points), and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States,

the Commission, the state commission, any state affected, or any party in interest.

* * * *

**§ 303 General Powers of Commission**

Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

* * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party;

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**§ 308 Applications for Licenses; Conditions in License for Foreign Communications**

(a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it:

* * * *

(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used;

the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee.

(c) The Commission in granting any license for a station intended or used for commercial communication between the United States or any territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions or restrictions authorized to be imposed with respect to submarine-cable licenses by Section 2 of an Act entitled "An Act relating to the landing and the operation of submarine cables in the United States", approved May 24, 1921.

**§ 309 Action upon Applications; Form of and Conditions Attached to Licenses**

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience and necessity would be served by the granting thereof, it shall grant such application.

(b) Except as provided in subsection (c) of this section, no such application—

(1) for an instrument of authorization in the case of a station in the broadcasting or common carrier services,

* * * *

shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.

* * * *

(g) The Commission is authorized to adopt reasonable classifications of applications and amendments in order to effectuate the purposes of this section.

(h) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein;

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 77-436

# In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

*v.*

MCI TELECOMMUNICATIONS CORP., ET AL., RESPONDENTS

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## PETITIONER'S REPLY

**DANIEL M. ARMSTRONG,**
*Associate General Counsel,*
**JOHN E. INGLE,**
*Counsel,*
*Federal Communications Commission,*
*Washington, D.C. 20554*
*(202) 632-7112.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1977

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No. 77-436

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

*v.*

MCI TELECOMMUNICATIONS CORP., ET AL., RESPONDENTS

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## PETITIONER'S REPLY

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The Federal Communications Commission has asked this Court to grant its petition for writ of certiorari because (1) the decision below conflicts directly with decisions of two other circuits construing the scope of authorized competition by specialized communications common carriers, and conflicts in principle with decisions of this and other courts construing Section 214 of the Communications Act of 1934, 47 U.S.C. § 214, and other public utility certification statutes; (2) the decision would cause fundamental changes and disruption in the communications industry and would have a significant impact on the FCC's common carrier certification process; and (3) the decision is wrong as a matter of statutory construction, in that it ignores the plain language of Section 214 and the FCC's consistent interpretation and application of that statute over

the years. (FCC Pet., pp. 12–26). MCI Telecommunications Corp. and Southern Pacific Communications Co. filed briefs in opposition, and the FCC hereby replies.[1]

1. *Conflicts.* Neither MCI nor Southern Pacific has refuted the FCC's demonstration of direct conflict and conflict in principle between the decision below and decisions of other circuits and of this Court. (FCC Pet., pp. 13–17.) The undeniable fact remains that the Ninth and Third Circuits construed the FCC's specialized common carrier policy [2] as authorizing competition only in the field of private line services. That construction was an essential premise to their affirmance of aspects of the competition policy.[3] MCI's characterization of the findings of those courts as "merely prefatory" (MCI Br., p. 15) is inconsistent with positions which MCI and other parties including the FCC urged on those courts at the time and upon which those courts quite properly relied.

Perhaps the strongest assertion that the specialized carriers were limited to private line services came in a pleading MCI itself filed in the Ninth Circuit to rebut claims that the FCC had authorized specialized carriers to provide the functional equivalent of ordinary long distance telephone service. MCI responded:

> Specialized carriers are *not* authorized to furnish the equivalent [of] ordinary long distance telephone service, and to the best of our knowledge this is the first time anyone has ever alleged that they are. Contrary to what is implied in NARUC's instant pleading specialized

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[1] Companion petitions were filed by the United States Independent Telephone Association (No. 77–420) and the American Telephone & Telegraph Co. (77–421). The National Association of Regulatory Utility Commissioners and the public utility commissions of several states have moved for leave to file briefs as *amici curiae* in support of the petitions for writ of certiorari.

[2] *Specialized Common Carrier Services,* 29 FCC 2d 870, 31 FCC 2d 1106 (1971).

[3] *Washington Util. & Transp. Comm.* v. *FCC,* 513 F. 2d. 1142 (9th Cir.), *cert. denied,* 423 U.S. 836 (1975); *Bell Tel. Co. of Penn.* v. *FCC,* 503 F. 2d 1250 (3rd Cir. 1974), *cert. denied,* 422 U.S. 1026, *reh. denied,* 423 U.S. 886 (1975).

> carriers were never supposed to be limited to "data communications." Most specialized carriers never even projected that data communications would account for the bulk of their business. They proposed, and have been authorized, to provide the full range of *private line* services. They have never proposed—and have not applied for the facilities required for—the provision of long distance service, which involves the ability to reach every other telephone in the system.[4]

This filing shows plainly that MCI had a different view of its authority when the seminal policy decision was on direct review. More importantly for purposes of the present petitions, it demonstrates that MCI considered it crucial for the Ninth Circuit to understand the boundaries of the competition the FCC had authorized. We believe the Ninth Circuit correctly understood those boundaries and that its decision to affirm was founded upon that understanding as an essential premise. The decision below in this case conflicts directly with that construction of the scope of authorization for specialized carriers.[5]

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[4] Motion [of MCI] to Strike Consolidated Answer to Motion and Cross-Motion for Leave to File Copies of Commission Decision, pp. 9–10, filed May 15, 1974, in *Washington Util. & Transp. Comm.* v. *FCC*, No. 71–2919, 9th Circuit. [Emphasis in original.]

[5] See FCC Pet., pp. 13–15. The conflict with the Third Circuit decision may be even stronger. In addition to analyzing the FCC's policy under the standard of the *RCA Communications* case, 346 U.S. 86 (1953), the Third Circuit had to consider whether an order requiring AT&T to interconnect with the specialized carriers was overly broad because it required interconnection for all of the specialized carriers' "authorized services." The court found that the order was not overly broad because its scope was limited to the services authorized in the specialized carrier proceeding. Since that proceeding authorized only private line services, the court held, the FCC had not imposed an "unbounded interconnection order." 503 F. 2d at 1273–74. If the Third Circuit had construed Section 214 and the specialized carrier policy as the D.C. Circuit did in this case, the interconnection order might well have been found to be "unbounded" and impermissibly broad. MCI and Southern Pacific ignore the Commission's further point that this Court denied certiorari in both the Ninth and Third Circuit cases on the basis of oppositions emphasizing the limited scope of competition by specialized carriers.

Nor have MCI and Southern Pacific reconciled the decision below with the principle this Court established in *Federal Communications Comm.* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953), a case which also arose under Section 214 of the Communications Act. In the *RCA Communications* case, this Court construed Section 214 to require the FCC to make specific public interest findings before authorizing new competitive entry into a communications market. The Execunet court, in contrast, read that statute to require specific public interest findings just to maintain the *status quo* as to markets that no one had even sought to enter. Put another way, the *RCA Communications* case would bar entry by an applicant unless the FCC can warrant that the public interest requires it; the Execunet decision would presume a right to entry by one who has not even sought certification unless the FCC has made an "affirmative determination" that the public interest requires exclusion.[6] Indeed, a direct result of the Execunet decision is the entry of MCI into a communications market without any consideration by the FCC of the questions the *RCA Communications* Court thought essential. The obvious conflict in principle requires resolution by this Court.

2. *Importance.* MCI and Southern Pacific have avoided addressing directly the Commission's argument that this case raises questions of fundamental importance to performance of the agency's common carrier certification function. Intead, they

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[6] See also *Hawaiian Tel. Co.* v. *FCC*, 498 F. 2d 771 (D.C. Cir. 1974). The *Hawaiian Telephone* court contemplated the authorization of facilities that were restricted to those services the applicant had shown a need for, just as the FCC contemplated in the specialized common carrier policy decision. This is apparent from the court's recognition that RCA in that case might well have established a need for "satellite service in general" even though it had not justified competitive entry into the international *voice* communications market via those same satellite facilities. 498 F. 2d at 774 n. 10, 776–77. Neither MCI nor the court below has reconciled *Hawaiian Telephone*, as an application of the *RCA Communications* principle, with the decision on Execunet.

have contended that the remand will permit the FCC to remedy any problems raised by the decision. This response ignores the obvious fact that the decision below has significance far beyond the question whether MCI can offer a particular communications service called Execunet.[7] Nothing the Commission can do in further proceedings on remand will alter the novel statutory interpretation the court of appeals has imposed and the radical changes that interpretation will require in all future certification proceedings.

As we have pointed out, the FCC always has construed Section 214 to permit it to consider certification in terms of the services the applicant proposes to offer. Its analysis has not had to go beyond the proposed services; and its limited service authorizations have not included affirmative determinations that the public interest requires the applicants to remain within the service categories they have proposed and applied for. Limitations in appropriate cases have been imposed by issuance of the certificate "as applied for." 47 U.S.C. § 214(c).

Denial of certiorari would require the FCC, in future certification cases, to consider not only the proposed services but also the public interest in introducing competition in areas the applicant never contemplated. Thus, an applicant for certification to provide only television relay service, for example, proposing to convey program material between cities, might have its application held up until the FCC had determined what the public interest requires as to any and all other services that might be carried over the same facilities—even though the

[7] The FCC might well resolve the narrow question whether MCI should be permitted to offer Execunet in further proceedings on remand. But the FCC firmly believes that it should not hold such further proceedings in the context of this case. The FCC authorized MCI and others to offer private line services. When MCI tried to go beyond its authorization to offer Execunet, the FCC required MCI to cease and desist from the offering. If MCI wants to change its authorization to include such nonprivate line services as Execunet, it is free to apply for a modification of its Section 214 certificates or to ask the FCC to conduct a further policy making proceeding along the lines of the specialized carrier proceeding.

applicant has no interest in those services.[8] Further agency proceedings on remand would not alter that new certification procedure.[9]

The decision below is sufficiently important to the administration of the Communications Act to require the grant of certiorari, wholly apart from other considerations. *Atlantic Rfg. Co.* v. *Public Serv. Comm.*, 360 U.S. 378, 382 (1959); *United States* v. *Ruzicka*, 329 U.S. 287, 288 (1946).[10]

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[8] The example is not far fetched. MCI applied specifically for a narrow part of the total package of common carrier services—those under the rubric of private lines. It expressly disclaimed any interest in providing other services, such as ordinary long distance service. (*E.g.*, Pet. App. B, p. 136a. See also excerpt from MCI pleading in Ninth Circuit review of specialized carrier policy decision, quoted at pp. 2–3, *supra*.) Yet, under the procedures required by the court of appeals, the FCC should have considered not only whether competition was desirable in the area proposed by MCI, but also whether the public interest required limitations to that area. Plainly, consideration of this second question would have been time consuming, superfluous in light of the applications, and perhaps fatal to any meaningful chance of competitive entry. Indeed, MCI and the other applicants, joined by the Department of Justice, urged the FCC to confine its analysis of competitive entry to the narrow areas proposed in the applications.

[9] As to changes and disruptions of the industry, we rest primarily upon our petition. (FCC Pet., pp. 18–19.) We add only that some of the changes we anticipated already have begun. MCI recently issued new marketing brochures offering additional nonprivate line services and describing MCI as "part of the telephone system" and as a company offering "long distance telephone service for business." Southern Pacific has filed new tariffs seeking to offer service virtually identical to Execunet. Southern Pacific Transmittal No. 113, Tariff FCC No. 6, filed October 20, 1977. While the D.C. Circuit's stay of its own mandate permits the FCC to delay the institution of these changes until after this Court has acted finally on the matter, we point out that both of these developments would bring significant competition into a sector of the communications industry as to which the FCC never has made the public interest findings this Court required in *RCA Communications*.

[10] MCI refers to bills introduced in Congress during the past several sessions, and appears to suggest that those bills might obviate the need for further judicial review of the Execunet case. But that legislation, if adopted, would alter *substantive* standards for new entry into communica-

3. *Error.* The court erred in construing Section 214 to forbid the FCC from granting limited service certificates in the absence of an affirmative determination that the public interest requires the limitation. (FCC Pet., pp. 20–23.) Section 214(c) expressly authorizes the Commission to issue a certificate "as applied for"—plainly contemplating that the agency in appropriate cases will confine its scrutiny to the terms of the proposal and grant authorizations no broader than "applied for." Contrary to the assertions of MCI and Southern Pacific and the apparent understanding of the court of appeals, the Commission has interpreted the statute this way for many years and has created limited service carrier classifications by regulation as well as by *ad hoc* certification.[11]

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tions common carriage to increase the barriers to competition. It would not change the certification *procedure* under Section 214, which is what this case is about. (See FCC Pet., pp. 19–23.) The Commission has opposed the legislative changes vigorously because they would undo or restrict its competition policies. *E.g.*, Letter to Hon. Lionel van Deerlin from FCC Chairman Richard E. Wiley (by direction of the Commission), September 23, 1976 (comments on H.R. 12323 and related bills). Possible adoption of legislation which the Commission opposes and which does not address the statutory problem at issue cannot be a substitute for Supreme Court review of this important regulatory decision.

[11] See FCC Pet., pp. 5 & nn. 7–9, 23 & n. 48. See also, *e.g.*, *ITT World Comm., Inc.*, 2 FCC 2d 573 (1966) (granting application for modification of limited service certificates to permit voice service by record carriers); *American Tel. & Tel. Co.*, 38 FCC 1222, *aff'd*, 1 FCC 2d 374 (1965) (allowing AT&T tariffs to become effective offering new service on specific finding that the certificates for the cable had been granted with express authority to provide this service); *AT&T–RCA Communications, Inc.*, 27 FCC 281 (Initial Decision), *aff'd*, 27 FCC 271 (1959) (granting RCA certificates with restrictions against voice message telephone service because RCA had not shown that the public interest required its entry into overseas voice MTS); *AT&T*, 8 Pike & Fischer Rad. Reg. 1217 (1955) (granting certificate to lay cable to Hawaii and explicitly permitting AT&T to provide record service on national defense grounds). *Compare RCA Global Comm., Inc.*, 37 FCC 2d 1043 (1972) (granting certificate to lease satellite circuits and to provide private line voice service to Hawaii), *rev. sub nom. Hawaiian Tel. Co* v. *FCC*, *supra*, 498 F. 2d 771 (on grounds that the FCC had not made affirmative public interest findings that would justify RCA's entry into the private line voice service market.)

As a practical matter, it would make no sense to require the agency to consider the universe of services when it could act on a limited certificate far more expeditiously by considering only the services applied for.[12] By restricting its analysis to private line services in the specialized carrier proceeding, the FCC avoided the difficult and time consuming questions it would have had to confront before opening the entire spectrum of communication common carrier services to competition. The court of appeals has held, however, that the cost of that avoidance was the inadvertent opening of all services, because the FCC did not affirmatively determine that the public interest required limitations. Requiring so broad a proceeding might have stopped the FCC's bold venture into competition before it started.[13] Revising the results of that proceeding, as the court below has done, opens communications markets to competition without the requisite statutory findings, and makes effective an order dfferent from any the FCC has granted.

MCI's and Southern Pacific's reliance upon the FCC's order in Docket No. 19117 [14] is misplaced. First, and most important,

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[12] This Court has held repeatedly that agencies and courts need decide only those questions that are before them for resolution. (See FCC Pet., pp. 20–21 n. 42). In a case involving another certification statute, the Court said, "We do not read the statute as laying a compulsion upon the Commission to canvass all the questions of public and private interest that are implicit in an application" when the applicant himself seeks only a certain favor and makes no claim beyond that favor. *United States* v. *Maher*, 307 U.S. 148, 156 (1939). MCI and the other specialized carriers never have applied for anything beyond certification to provide private line services.

[13] In other contexts, this Court has made clear that agencies and legislatures may implement programs step by step, adopting policies that address part of a problem without taking on the entire matter at once. *Cf. City of New Orleans* v. *Dukes*, 427 U.S. 297, 303–04 (1976); *Katzenbach* v. *Morgan*, 384 U.S. 641, 657–58 (1966). So here, the FCC was not required to resolve the entire matter of competition in communications services in the context of the specialized carrier proceeding.

[14] *Authorization of New or Revised Classifications of Communications*, 39 FCC 2d 131 (1973). In that docket, the FCC decided, after receiving comments, not to issue new rules which would have required prior authorisation for any new service offering by any carrier, regardless of whether the new service fitted within the carrier's certification. The FCC had initiated

the court of appeals did not rely on anything the FCC said in that order, but rested its decision entirely upon its perception that the FCC had failed in its specialized carrier proceeding to make the requisite statutory finding to limit MCI to private line services. Second, the FCC did not purport to modify its specialized carrier policy in its order terminating Docket No. 19117; indeed, the order resulted in a non-decision, the FCC terminating the docket without adopting rules because it saw no need for them. Finally, the Commission could not, in any event, take such a significant regulatory step as opening the public telephone network to competition in an abbreviated proceeding which gave no notice of such an intention and announced no such result.[15]

MCI's other arguments do not undercut the substantial reasons advanced for granting the writ. (A) The court of appeals specifically rejected the argument that the FCC had failed to follow the required procedures in adopting the Execunet order. Notice and comment and oral argument were adequate procedures for a tariff investigation leading to a cease and desist order. 47 U.S.C. § 205(a). (Pet. App., p. 18a n. 43.) (B) The court of appeals did not find that AT&T's oral complaint,

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the docket while the specialized carrier proceeding was pending, out of concern that the established carriers might frustrate new entry by filing new tariffs offering the services that had been proposed by the specialized carriers, while delaying facility authorizations to the new carriers by filing petitions to deny. *Notice of Proposed Rule Making*, 27 FCC 2d 36 (1971). The FCC terminated the docket without adopting rules, because its concern had been "substantially mitigated" by adoption of the specialized carrier policy. As a result of that policy, the Commission said, "new entry is no longer being delayed by the unresolved status of policy questions raised by existing carriers with respect to the service proposals of each new applicant." 39 FCC 2d at 133.

[15] MCI's reading of Docket No. 19117 as removing restrictions on its authorization is hard to reconcile with positions it has taken before the FCC and in court long after the Commission terminated that docket on February 5, 1973. (Pet. App. B, pp. 137a, 153a–68a; see also excerpt from MCI pleading in Ninth Circuit, quoted at pp. 2–3, *supra*, which was filed more than 15 months after the FCC had issued its final decision in Docket No. 19117).

prior to initiation of proceedings with regard to Execunet, had infected the Commission's decision making process. The complaint was entirely consistent with the Communications Act, 47 U.S.C. § 208; with the Commission's rules governing *ex parte* contracts, 47 C.F.R. §§ 1. 1201–1251; and with the FCC's practice of relying upon complaints by the public and by competitors to help it police the common carrier industry, *Rules Governing Ex Parte Comunications*, 1 FCC 2d 49, 57, 58, (1965). Moreover after receipt of the oral complaint the Commission conducted an extensive inquiry on the record, and rested its decision solely upon the comments and arguments of the parties and upon its own interpretation of the policies and tariffs involved. (Pet. App. B, pp. 67a–71a.) (C) The court of appeals did not accept MCI's argument that, even if its authorizations were limited, Execunet is a private line service well within the limitations. (Pet. App. A, pp. 28a.) As the Commission found, a service which permits calls from any telephone in one city to any telephone in other cities on the network, over facilities that are not private in any meaningful sense, and a a toll charge for each call simply is not private line service. (Pet. App. B, pp. 61a–62a.)

4. *Conclusion.* The FCC's objective in the specialized common carrier proceeding was to develop policy to govern applications and to meet a specific need for more and better private line services. Its analysis and its decision quite properly went no farther than necessary to resolve the immediate questions. Its cautious limitation of the competition policy to services "as applied for" was appropriate in view of the very different questions that would surround MTS competition, the time and resources it would take to answer those questions, and the fact that a policy of limited competition would not interfere with realization of its immediate objectives.

The decision below tells the FCC that it did not know what it was doing under Section 214, and that it inadvertently authorized competition in all common carrier services without considering the public interest in so sweeping a change. In short, the court of appeals tells the FCC that it has lost control of its com-

petition policies. MCI, in effect, is telling the FCC that it might have been tricked into opening ordinary long distance service to competition, even though MCI and the other applicants for entry had solemnly assured the Commission and the courts that the only services in question were private line services.

The decision below jeopardizes the FCC's promotion of competition where it is reasonably feasible and where it may reasonably be expected to benefit the public. If the FCC cannot open the field to competition step by step—as it makes discrete findings of public convenience and necessity in the context of concrete proposals—its policies may be delayed or even undone altogether. The court should grant certiorari to review this important regulatory decision.

Respectfully submitted,

DANIEL M. ARMSTRONG
*Associate General Counsel,*
JOHN E. INGLE,
*Counsel,*
*Federal Communications Commission,*
*Washington, D.C. 20554*
*632-7112.*

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No. 77-436

# In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

*v.*

MCI TELECOMMUNICATIONS CORP., ET AL., RESPONDENTS

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## PETITIONER'S SUPPLEMENTAL BRIEF

**ROBERT R. BRUCE,**
*General Counsel,*
**DANIEL M. ARMSTRONG,**
*Associate General Counsel,*
**JOHN E. INGLE,**
*Counsel,*
*Federal Communications Commission,*
*Washington, D.C. 20554,*
*(202)632-7112.*

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*v.*

MCI TELECOMMUNICATIONS CORP., ET AL., RESPONDENTS

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## PETITIONER'S SUPPLEMENTAL BRIEF

The Federal Communications Commission supplements its petition and reply, pursuant to Rule 24(5), to invite the Court's attention to a recent decision of still another circuit construing the Commission's Specialized Common Carrier Services policy in a manner that conflicts with the decision below in this case. The Second Circuit (Kaufman, C.J.), in a summary of the "position and function of licensed communications carriers" in this country, stated:

> Recently, the FCC has encouraged entry of new carriers into the domestic communications field. In the early 1970's, the Commission began licensing various Domestic Satellite Common Carriers ("DSCCs") and Specialized Common Carriers ("SCCs") to offer, in competition with AT&T, private line service to governmental and large private commercial users. *See,*

*e.g., Specialized Common Carrier Services*, 29 F.C.C. 2d 870 (1971) * * *.

*Western Union International, Inc.* v. *FCC*, Nos. 77–4183, 77–4184, 77–4191, 2d Circuit, decided December 21, 1977 (footnote omitted).

The quoted language was not the holding of the case, nor was it an essential premise to the decision. In that sense, it does not pose the direct conflict that the Third and Ninth Circuit decisions posed. (See Pet., pp. 8–9, 13–15; Reply, pp. 2–3.) However, it does confront the Court with a third circuit that has construed Specialized Common Carrier Services authorizations as limited to private line services—in direct conflict with the holding of the District of Columbia Circuit that the authorizations are not limited.

Respectfully submitted,

ROBERT R. BRUCE,
*General Counsel,*
DANIEL M. ARMSTRONG,
*Associate General Counsel,*
JOHN E. INGLE,
*Counsel,*
*Federal Communications Commission,*
*1919 M Street, N.W.,*
*Washington, D.C. 20554,*
*(202) 632–7112.*

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FEDERAL COMMUNICATIONS COMMISSION,
*Petitioner,*

v.

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC. and N-TRIPLE-C, INC.,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

PAUL RODGERS
*General Counsel*

CHARLES A. SCHNEIDER
*Assistant General Counsel*

WILLIAM R. NUSBAUM
*Deputy Assistant General Counsel*

National Association of Regulatory Utility Commissioners

1102 ICC Building
Post Office Box 684
Washington, D.C. 20044

(202) 628-7324

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No.

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FEDERAL COMMUNICATIONS COMMISSION,
*Petitioner,*

v.

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC. and N-TRIPLE-C, INC.,
*Respondents.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Association of Regulatory Utility Commissioners (NARUC) respectfully moves the Court for leave to file the attached brief *amicus curiae* in support of the Petition for Writ of Certiorari in the above-entitled cause. In support of its Motion, the NARUC shows:

Consent to the filing of a brief in this cause by the NARUC was sought from the parties to the proceedings in the court below. Consents were obtained from several of those parties. However, the consent of the Respondents, MCI Telecommunications Corporation, Microwave

Communications, Inc. and N-Triple-C, Inc., has been refused.

The National Association of Regulatory Utility Commissioners is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the 50 States, and the governmental agencies of the District of Columbia, Puerto Rico, and the Virgin Islands, engaged, pursuant to duly adopted legislation, in the regulation of telecommunications common carriers and other public utilities within their respective borders. The mission of the NARUC is to improve the quality and effectiveness of regulation of public utilities throughout the United States and, through the governmental agencies which make up its membership, to maintain for the use of the public such telecommunications services and facilities as may be required by the public convenience and necessity and to insure the continued availability of those services and facilities at rates which are just and reasonable. "Congress and the FCC have long recognized that the State utilities commissions are the appropriate parties to represent their respective States in this effort," and therefore, "Congress has accorded NARUC official status as the representative of State regulatory agencies in dealing with the basic problem"[1] of maintaining widely available, low cost, local telephone service.

This case is before this Court on a Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals had before it a petition for review, initiated by MCI Telecommunications Corporation, Microwave Communications, Inc. and N-Triple-C, Inc. (MCI), of a decision of the Federal Communications Commission (FCC) holding that MCI had exceeded its authorization, limited to the offering of private line services, by providing a service called "Execunet",

[1] *Washington Utilities & Transp. Comm'n* v. *FCC*, 513 F.2d 1142, 1148, 1154 n. 17 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

which the FCC found was not a private line service at all but instead was the equivalent of message telephone service (ordinary long distance service). *MCI Telecommunications Corp. Investigation Into the Lawfulness of Tariff FCC No. 1 Insofar as it Purports to Offer Execunet Service*, 60 F.C.C.2d 25 (1976). The FCC's decision with respect to Execunet was predicated upon its earlier decision, *Specialized Common Carrier Services*, 29 F.C.C.2d 870 (1971), in which it had articulated the findings and evidence in support of its conclusion that the entry of MCI and other specialized common carriers, limited to the offering of private line services, was in the public interest. That decision was affirmed by the Court of Appeals for the Ninth Circuit in a decision which this Court elected not to review further. *Washington Utilities & Transp. Comm'n.* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). In disregard of those decisions and the FCC's continued rearticulation and reapplication of its now settled policy determination limiting MCI and other specialized common carriers to the provision of private line services, the Court of Appeals below held that MCI, and presumably all other specialized common carriers, are not limited to the offering of private line services and can offer ordinary long distance service and any other services they choose between and among the states throughout the country.

The NARUC and the State utilities commissions that comprise its membership have an historic and vital interest in the disposition of the Petition for Writ of Certiorari now pending before this Court. The decision of the Court of Appeals, by improperly setting aside the FCC's determination that MCI was not and is not authorized to provide Execunet service and, thereby, for the first time permitting competition for message telephone service in addition to private line service, will have a direct and potentially staggering effect both upon regulatory policies developed over decades to promote the availability of local telephone

service at reasonable rates and upon the rates for those services themselves.[2] The nature of NARUC's concern about the effects of such competition, even as limited by the FCC, was most eloquently stated by a long-time, former member of one of the State commissions comprising the NARUC in testimony before Congress:

> At present, the state regulator is able to design rates in a way that the charge for the basic services — i.e. for the use of his telephone by the average householder — is held low, while other charges, such as for terminal facilities, extensions, PBX's, etc., are kept higher. Also, residential rates are invariably kept lower than business rates. These rate policies are not new, but historical, and have served the nation well.
>
> But now these new — and I can only call them selfish — interests have appeared with the clear intention of under-pricing in those special areas in which regulators have heretofore kept the prices higher; kept them higher in order to provide lower, though reasonable, charges for the

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[2] In its own investigation of the impact of such competition concluded in early 1974, the NARUC's Committee on Communications, after formal hearings and based upon extensive submissions by a number of parties, estimated that "the total annual costs shifted from interstate to intrastate jurisdictions as a result of SCC [Specialized Common Carrier] competition will reach a minimum of approximately $390 million annually by 1980, increasing to approximately $890 million annually by 1984. On a cumulative basis, the costs are estimated to exceed $1.1 billion by 1980, increasing to approximately $3.9 billion by 1984. Committee on Communications, National Association of Regulatory Utility Commissioners, Report After Investigation, p. 71 (May 15, 1974).

This estimate of the impact of the entry of competition for private line service did not contemplate the far more serious effect upon the interests of the States of the decision below permitting for the first time competition in the provision of message telephone service.

> great body of household telephone users across the country. Such competition may be good for these special interest entities which are not at all adverse to competing with a regulated system But it is not good, in my opinion, for the American public, especially the part of it which is economically disadvantaged — the unfortunate. It ties the regulator's hands as he attempts to set rates which will meet overall public interest standards — and especially the needs of the poor, the elderly, and the ill.
>
> To allow selective entry into this market by, for example, the specialized common carrier can only result in a further dislocation of present tenuous regulatory rate options. Regulators would then have no choice but to give greater weight than formerly to the cost of serving each class of customer with the result that a steeper rate of increase to the lower-income telephone user would be inescapable. Some may ask, 'What's wrong with that? This customer is only being asked to pay his fair share — what it costs to serve him.' What, in my opinion, — is wrong with it is that it lacks the input of responsible government with a social conscience — without which a government will not long be governing.[3]

This Court's disposition of this case will thus have a direct impact upon the ability of State regulatory commissions to discharge their responsibilities on behalf of the citizens within their respective borders. Accordingly, the NARUC submits that its participation in these proceedings is essential to insure the full and adequate representation of the in-

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[3] Testimony of Cyrus J. Colter, *Hearings on S. 1167 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess., pt. 5, at 3812-13 (1974).

terests of the State commissions of which it is comprised, as well as the interests of the public to whom those commissions are obligated to insure the continued availability of affordable telephone service.

Wherefore, it is respectfully requested that this Court grant leave for the filing of a brief by the National Association of Regulatory Utility Commissioners, as *amicus curiae*, in this case.

Dated this 27 day of September, 1977.

PAUL RODGERS
General Counsel

CHARLES A. SCHNEIDER
Assistant General Counsel

WILLIAM R. NUSBAUM
Deputy Assistant
General Counsel

National Association of
Regulatory Utility
Commissioners

1102 ICC Building
Post Office Box 684
Washington, D.C. 20044

(202) 628-7324

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

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No.

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FEDERAL COMMUNICATIONS COMMISSION,
*Petitioner,*

v.

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC. and N-TRIPLE-C, INC.,
*Respondents.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## BRIEF FOR THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS *AMICUS CURIAE*

The National Association of Regulatory Utility Commissioners submits, as provided by Rule 42 of the Rules of this Court, the following brief *amicus curiae* in support of the Petition For Writ of Certiorari filed by the Federal Communications Commission.

## OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, dated July 28, 1977, is not reported. The opinion of the Federal Communications Commission is reported at 60 F.C.C.2d 25 (1976).

## QUESTION PRESENTED

This case presents questions vital to the NARUC and to consumers throughout the United States whose telephone rates and service are regulated by State regulatory commissions comprising the NARUC. In the *Specialized Common Carrier* decision [29 F.C.C.2d 870 (1971)], after carefully balancing the public interest considerations advanced by the NARUC and the numerous other parties participating, the FCC concluded an exhaustive rulemaking proceeding by drawing a line permitting the entry of new carriers to provide private line services in competition with established carriers.[1] The Commission's findings and conclusions that the line it had drawn was in the public interest were subsequently affirmed on judicial review, *Washington Utilities & Transportation Comm'n* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836, 96 S. Ct. 62, 46 L.Ed.2d 54 (1975), and have been rearticulated and refined by the Commission in numerous proceedings since. In one

[1] There are three primary long distance telephone services: Message Telecommunications Service (MTS); Wide Area Telecommunications Service (WATS); and Private Line Services. MTS is ordinary long distance service in which the subscriber has access to all other telephones connected to the switched network and is charged for each message completed. WATS likewise offers access to all telephones connected to the switched network in a given geographical area for a monthly charge related to the area covered and the extent of usage. In marked contrast to MTS and WATS, Private Line Service does not afford the subscriber access to all other telephones connected to the switched network. Instead it enables specific telephones to be connected by "leased" or "dedicated" circuits on a continuous basis for a flat charge per month.

such proceeding, *MCI Telecommunications Corp., Investigation Into the Lawfulness of Tariff FCC No. 1 Insofar as it Purports to Offer Execunet Service*, 60 F.C.C.2d 25 (1976), the Commission applied its policy determination limiting specialized common carriers to the provision of private line services by ordering MCI to discontinue the offering of a service known as "Execunet" because it was not a private line service and therefore exceeded MCI's authorization under the *Specialized Common Carrier* decision. The decision of the United States Court of Appeals for the District of Columbia Circuit setting aside the Commission's decision with respect to Execunet, on the ground that it was unsupported by adequate public interest findings that limited MCI's authorization to private line services, thus presents the following question:

> Whether the Court of Appeals decision, setting aside a decision of the Federal Communications Commission for not having made the requisite public interest findings required to limit MCI's authorization and to order MCI to cease and desist from offering a service which exceeded its authorization, is in conflict with decisions of this Court and the Court of Appeals which have regularly approved the action of administrative agencies rejecting a course of conduct, whether proposed or in effect, on the ground that it is inconsistent with a prior agency policy, without requiring the agency to repeat the evidence and findings upon which that policy was based?

## *INTEREST OF AMICUS CURIAE*

The interests of the NARUC as *amicus curiae* are set forth in the attached motion for leave to file this brief.

## STATEMENT

With the sanction of State legislators, and following the passage by Congress of the Communications Act of 1934, telecommunications services have historically been provided on a monopoly basis by the Bell System companies and independent companies with general service responsibilities subject to pervasive State and Federal regulation in the public interest. Beginning with its decision in *Microwave Communications, Inc.*, 18 F.C.C.2d 953 (1969), *recon. denied*, 21 F.C.C.2d 190 (1970),[2] the FCC initiated an abrupt but limited departure from this policy by permitting the entry of a small carrier proposing to offer point-to-point private line services between Chicago and St. Louis, upon finding that its entry would serve the public interest in providing "its subscribers limited common carrier microwave radio service, designed to meet the interoffice and interplant communications needs of small businesses". 18 F.C.C. 2d at 953. The limited nature of the authorization which MCI sought and the FCC granted was apparent from MCI's pleadings, where it acknowledged that it "is not offering a public switched telephone service. It cannot and will not have any effect on the public switched telephone network . . .".[3]

Following that decision, the FCC instituted its *Specialized Common Carrier* rulemaking proceeding in July, 1970, to determine the need for and ground rules of entry by a large number of applicants seeking authorization to construct microwave facilities to provide specialized point-to-point private line services over high density routes in various parts of the country in competition with the

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[2] F.C.C. Docket Nos. 16509-16519.

[3] MCI Opposition to Petitions for Reconsideration, F.C.C. Docket Nos. 16509-16519 (October 7, 1969) p. 14. (Supp. App. p.338). The foregoing reference to "Supp. App.", as well as those which follow, are to the Supplemental Appendix in the court below.

private line services offered by existing communications common carriers.[4] At that time there were 1,731 pending applications for microwave stations, and as of March 15, 1971, there were 33 applicants with 46 separate proposals for a total of 1,877 microwave stations. There was never any question that the applicants were seeking authority limited to the provision of private line service and were expressly disclaiming any intention of attempting to offer message telephone or exchange services. MCI itself stressed this very point:

> The exchange services offered by the telephone company are not similar in any way to the services which the Specialized Common Carriers propose to provide . . . . Specialized Common Carriers will provide only specialized point-to-point private line services.[5]

Despite the limited nature of the authorizations being sought, the NARUC urged the FCC not to permit new entry and the competition which would flow from it. The NARUC's principal concern was centered around the effect of new entry upon two basic regulatory policies, which had been developed through the cooperative efforts of State regulatory commissions and the FCC.[6] These policies

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[4] *In the Matter of Establishment of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendment to Parts 21, 43, and 61 of the Commission's Rules*, F.C.C. Docket No. 18920, 24 F.C.C.2d 318 (1970).

[5] MCI Comments, F.C.C. Docket No. 18920 (October 1, 1970), pp. 102-03 (Supp. App. p. 339).

[6] The Communications Act of 1934 was predicated upon a Congressional determination that the public interest required detailed regulation of the telephone industry to insure that common carriers

(continued)

governed the pricing of telephone services by the Bell System operating companies, and the independent, general service telephone companies, which together served as the exclusive providers of telephone services to the people of the United States.

The first policy involved rate and cost averaging. As first applied by the States and then by the FCC, rates for intercity communications services have traditionally been averaged on a statewide and on a nationwide basis, so that the rates charged for service between any two equidistant points are essentially the same, regardless of the specific costs of providing service along any given route.[7] The second of these policies, which was developed following this Court's decision in *Smith* v. *Illinois Bell Telephone Co.*, 282 U.S. 133, 51 S.Ct. 65, 75 L.Ed. 255 (1930), involved jurisdictional separations of telephone plant used jointly and in common to provide intrastate services and interstate message services and the assignment of the investment in that plant and certain other expenses to the respective jurisdictions involved.

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[6] (continued)
"make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges" (47 U.S.C. §151). Congress recognized and preserved the pre-existing role of the States in regulating this vital industry and established a dual and cooperative regulatory scheme between the States and the FCC to insure its continued regulation in the public interest. Thus the Act provides that it is not to "be construed to apply or to give the Commission jurisdiction with respect to . . . charges . . . in connection with intrastate communication service . . ." (47 U.S.C. §152(b)(1)) and establishes a mechanism for coordination between the State regulatory agencies and the FCC through the creation of Joint Boards (47 U.S.C. §410).

[7] *See Washington Dept. of Pub. Serv.* v. *Pacific Tel. & Tel. Co.*, 8 F.C.C. 342, 363-364 (1941).

As these jurisdictional separations formulas evolved to the current procedures embodied in the Ozark Plan,[8] annual local plant costs are allocated between State and interstate jurisdictions as a function of the relative interstate and intrastate usage of message services by telephone subscribers. Because interstate message toll usage increased rapidly over the years, due to the price stability made possible by cost-saving technological improvements and the economies realized by aggregating demand on a single nationwide network, interstate message usage outpaced the growth of intrastate and local exchange usage. With the relatively greater increase in interstate message usage, a relatively greater proportion of local plant costs was allocated to the interstate rate bases of the Bell System and independent companies. Hence the result of these policies was that the State commissions comprising the NARUC were able to maintain the rates for local telephone service at lower levels than would otherwise be possible and thereby insure the widest availability of service to their citizens.

Given the nature of those policies, the NARUC believed that permitting the entry of MCI and other specialized common carriers, even if limited to the offering of private line services in competition with the Bell System and other established carriers, would threaten the continuing viability of the policies and the social objectives they were designed to serve. Because the specialized common carriers only proposed to offer private line services between major metropolitan areas that generated a high density of traffic, the effect of pre-existing rate and cost averaging and jurisdictional separation would permit the new entrants to underprice the non-cost related private line and message toll rates of the Bell System and other established carriers

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[8] *In the Matter of Prescription of Procedures for Separating and Allocating Plant Investment, Operating Expenses, Taxes and Reserves Between the Intrastate and the Interstate Operations of Telephone Companies*, 26 F.C.C.2d 247, 248 (1970).

and thus to cream-skim their rate structures.[9] Accordingly, the NARUC concluded that such competition would not only produce a diversion of the established carriers' private line traffic and a loss of the historical contribution that the revenue from that traffic had made to the joint and common costs of other services, but also would produce a diversion of message toll traffic, thereby yielding an increased allocation of costs, through separations procedures, to the intrastate jurisdictions. Moreover, the specialized common carriers were not subject to separations and could, therefore, engage in cream-skimming with impunity. Thus, the NARUC feared that the ultimate burden of the FCC's new policy would be borne by the average consumer, in the form of higher rates for local service — the singlemost important factor determining whether individuals can afford to have a telephone.

In its comments to the FCC in the *Specialized Common Carrier* proceeding the NARUC stressed that, if permitted, new entry would produce:

> . . . wasteful and destructive duplication of facilities, would divert revenues from existing common carriers, and, accordingly, the loss of such revenues would have to be recouped from the other communication users served by such

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[9] In *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Comm'n.* 341 U.S. 329, 71 S.Ct. 777, 95 L.Ed. 993 (1951), this Court recognized the nature of the creamskimming problem where there is selective entry into regulated industries of the kind involved here:

> Appellant asserts a right to compete for the cream of the volume business without regard to the local public convenience or necessity. Were appellant successful in this venture, it would no doubt be reflected adversely in Consolidated's over-all costs of service and its rates to customers whose only source of supply is Consolidated.

341 U.S. at 334.

> carriers. This recoupment could impair the national uniformity of interstate rates for communications service and would increase the economic burden imposed upon the users of interstate and intrastate communications furnished by such carriers.[10]

The NARUC concluded its comments by stating:

> . . . Commission stimulation of competition — for competitions sake — will primarily benefit a relatively small number of businesses and other affluent users. The economies achieved by this favored few will result in the economic over burdening of the millions of local users across the Nation. These users will have no need for the "specialized" services but, nevertheless, they will be forced to shoulder a greater burden in supporting the existing common carriers whose revenues would be diverted in part by new competitors.[11]

In deciding its *Specialized Common Carrier* proceeding, the FCC was thus called upon to carefully weigh the concerns voiced by the NARUC, as well as the positions of numerous other participating parties, and to draw a line with respect to the scope of services of the new entrants which, in its judgment, would not undermine the policies of nationwide rate averaging and jurisdictional separations and the goals they were designed to serve. The FCC drew this line by holding that the entry of the specialized com-

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[10] NARUC Comments, F.C.C. Docket No. 18920, as quoted in NARUC Brief, *Washington Utilities & Transp. Comm'n* v. *FCC*, 9th Cir. No. 72-1198 (May 5, 1972), p. 11.

[11] NARUC Comments, F.C.C. Docket No. 18920, as quoted in NARUC Brief, *Washington Utilities & Transp. Com'n* v. *FCC*, 9th Cir. No. 72-1198 (May 5, 1972), p. 11.

mon carriers was in the public interest, so long as they were limited to the offering of private line services.

After emphasizing that "the MCI carriers and others all propose point-to-point facilities for private line services", 29 F.C.C.2d at 871, the FCC held:

> In light of all of the foregoing and the record as a whole, . . . we find that: there is a public need and demand for the proposed facilities and services and for new and diverse sources of supply, competition in the specialized communications field is reasonably feasible, there are grounds for a reasonable expectation that new entry will have some beneficial effects, and there is no reason to anticipate that new entry would have any adverse impact on service to the public by existing carriers such as to outweigh the considerations supporting new entry.

29 F.C.C.2d at 920

Moreover, the FCC expressly found that, given the limited nature of the private line services being authorized, the "claims that competing carriers would simply be engaged in 'creamskimming' " appeared insubstantial. 29 F.C.C.2d at 910. Since the FCC had drawn its line to preclude the offering of message telephone service by the specialized common carriers and therefore stressed that "those services are not being challenged competitively to any substantial degree by the services proposed to be offered by the aspiring new entrants," it concluded that changes, if any, in pre-existing policies applicable to the pricing of telephone services would be limited to private line:

> There is no reason to believe that this approach to pricing of the interstate message service offerings of the Bell System and Western Union (such as MTS, WATS, and public telegraph) need be

> altered by new entry into the developing specialized communications market. Clearly, none of the uniform rate structures of the existing carriers for such services would appear to be in jeopardy since those services are not being challenged competititvely to any substantial degree by the services proposed to be offered by the aspiring new entrants. Where services may be in direct competition, departure from uniform nationwide pricing practices may be in order, and in such circumstances will not be opposed by the Commission.

29 F.C.C.2d at 915.

The Commission thus drew the line of allowed entry at private line service, *and no further,* after full consideration of the effect of such limited entry upon the public interest with respect to message telephone and WATS services.

Although the FCC had restricted the new entrants to the offering of private line services, the NARUC and the Washington Utilities and Transportation Commission continued to believe that new entry should not have been permitted at all and hence sought review of the FCC's decision in the Court of Appeals for the Ninth Circuit.[12] Because of the FCC's clear limitation of specialized common carriers to the offering of private line services, the Court of Appeals found that the issue before it involved the "business . . . of providing specialized private or leased line communication services through microwave transmission facilities, as distinguished from public exchange and long distance toll telephone service." 513 F.2d at 1155. Based upon that understanding, the Court of Appeals concluded that the FCC had proceeded properly by means of rulemaking to limit the class of telecommunications services within which com-

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[12] *Washington Utilities & Transp. Comm'n* v. *FCC,* 513 F.2d 1142 (9th Cir.), *cert. denied,* 423 U.S. 836, 96 S.Ct. 62, 46 L.Ed.2d 54 (1975).

petition was deemed to be in the public interest to private line services and that its findings were supported by the evidence of record:

> [T]he Commission may determine general questions relating to the public interest, convenience and necessity in rulemaking proceedings; and specifically, may determine that competition in the furnishing *of a class of regulated service* will lead not to poorer but to better service to the public, and will otherwise be in the public interest. (Emphasis supplied.)

513 F.2d at 1166.

MCI commenced commercial operations in January, 1972, offering point-to-point private line services pursuant to the authorizations granted by the FCC. Up to that time, MCI had plainly understood the limited nature of its authority and had expressly disclaimed any intention of seeking to exceed it by offering message telephone service. Precisely the same understanding existed for some period of time thereafter. Moreover, when a question arose late in 1973 concerning the extent to which MCI could use the local facilities of the Bell System companies to reach from its microwave towers to the premises of its customers, MCI reiterated to the Commission its understanding that "while the Commission concluded that it was feasible and desirable to have competing intercity systems for the provision of private line service . . . no one proposed — or authorized — the new carriers" to offer services other than private line.[13] In its resolution of this question, the FCC

[13] MCI Reply Brief, F.C.C. Docket No. 19896 (Feb. 4, 1974) p. 10. (Supp.App. p.341).

similarly underscored that its *Specialized Common Carrier* decision had only authorized the entry of the specialized carriers into the private line common carrier field.[14] The Court of Appeals for the Third Circuit affirmed the FCC's disposition of the local distribution question, predicating its decision upon the FCC's authorization of "the entry of specialized carriers into the full field of private line services." 503 F.2d at 1270.

The dispute over local distribution facilities was only one of many proceedings following its *Specialized Common Carrier* decision in which the FCC applied the line it had drawn there limiting the services the new carriers were authorized to provide to private line. Thus many subsequent applications seeking entry were routinely granted, including the application of United States Transmission Systems (a subsidiary of ITT), to offer specialized private line services.[15] In proceedings before the United States Court of Appeals for the District of Columbia Circuit to review the FCC's approval of that application, which had been granted without a hearing, the FCC reiterated the question it had resolved in the *Specialized Common Carrier* proceeding and where it had drawn the line:

> The Commisison in 1970 had pending a number of applications for microwave radio facilities, which were to be used for specialized common carrier services in various parts of the country.

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[14] *Bell System Tariff Offerings of Local Distribution Facilities* (F.C.C. Docket No. 19896), 46 F.C.C.2d 143 (1974), *aff'd. The Bell Telephone Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026, 95 S.Ct. 2620, 45 L.Ed.2d 684 (1975).

[15] *United States Transmission Systems, Inc.*, 48 F.C.C.2d 859 (1974), *aff'd. American Tel. & Tel. Co.* v. *FCC*, 539 F.2d 767 (D.C. Cir. 1976).

> The applicants proposed to offer a wide range of private line services . . . . They did not propose to offer ordinary long distance service or wide area telephone service (WATS).
>
> * * * *
>
> The open entry policy covered the full range of private line services . . . . [16]

In affirming the *USTS* decision,[17] the Court of Appeals recognized that it had been predicated upon what the FCC had decided in the *Specialized Common Carrier* proceeding:

> At issue in this case is the Commission's policy relating to private line communications services provided by specialized common carriers.
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> * * * *
>
> [The FCC] concluded that there is a public need and demand for the proposed services, that it is likely that new entry will have some beneficial effects and little if any adverse impact on existing carriers, and 'that a general policy in favor of the entry of new carriers . . . would serve the public interest, convenience and necessity.

539 F.2d at 769-70.

Moreover, the court pointed to the FCC's recognition that "a certain amount of 'creamskimming' would naturally occur" even from competition limited to private line services and the FCC's "view [that] start-up difficulties . . . can adequately be controlled by carefully monitoring implementation of its policy." 539 F.2d at 774.

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[16] FCC Brief, *American Tel. & Tel. Co.* v. *FCC*, D.C. Cir. No. 74-1953 (April 23, 1975), pp. 3-4, 7.

[17] *American Tel & Tel. Co.* v. *FCC*, 539 F.2d 767 (D.C. Cir 1976).

Beyond its disposition of applications like that involved in *USTS*, a major part of the FCC's regulatory program applicable to the provision of intercity services had been based upon the line it drew in the *Specialized Common Carrier* proceeding limiting specialized common carriers to the provision of private line services. Thus, in its decision in Docket No. 18128, a major and recently concluded investigation into rate levels, rate relationships and appropriate pricing and costing methodologies to be employed by the Bell System, the FCC made clear that its " 'ratemaking and regulatory policies and practices' ", as well as its determination of "what constituted a proper costing methodology," had been molded in light of the scope of competition, limited to private line services, which it had previously authorized.[18] And in its decision authorizing the resale and shared use of common carrier services and facilities, the FCC stressed that it would not permit subversion of its previously articulated "distinctions between private line services and MTS or WATS" and thereby provide specialized common carriers "the opportunity for creation of networks similar to MTS and WATS"[19] Indeed, as the FCC recently pointed out in a comprehensive report to Congress, "the Commission carefully and consistently has restricted competition to the private line field . . . so that nationwide rate averaging will continue for long distance telephone service."[20]

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[18]*AT&T, Revisions of Tariff FCC No. 260 Private Line Services, Series 5000 (TELPAK)*, 61 F.C.C.2d 587 (1976).

[19]*In the Matter of Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261 (1976), *recon. granted*, 62 F.C.C.2d 588, 602-03 (1977).

[20]Report by the Federal Communications Commission on Domestic Telecommunications Policies, Attachment B, p. 101, September 27, 1976.

Notwithstanding the reiteration by the FCC and the recognition by the courts that specialized common carriers were limited to the offering of private line services, MCI modified its tariffs late in 1974 in a way that enabled it subsequently to offer message telephone service under the guise of Execunet. Because of the manner in which its tariff was amended and its failure adequately to describe or even name the service there, the nature of Execunet was not known until MCI began actively promoting the service some months later. When AT&T learned of the service and determined that it was indistinguishable from message telephone service, it filed a complaint with the FCC seeking to halt the offering of the service on the ground that it exceeded MCI's authorization limited to private line services.

In a lengthy decision rendered after extensive proceedings, the FCC held that Execunet is "indistinguishable from MTS" and hence "is outside of MCI's authorizations". *MCI Telecommunications Corporation, Investigation Into the Lawfulness of Tariff FCC No. 1 Insofar as it Purports to Offer Execunet Service*, 60 F.C.C. 2d 25 (1976). The Commission stressed that its conclusion concerning the scope of MCI's authorization was premised upon its "foremost pronouncement of our policy regarding the role of Specialized Common Carriers in . . . the *Specialized Common Carrier* decision . . . ," that it had "never modified this policy, but rather" that it had "reaffirmed . . . [its] findings therein on several occasions" and that those findings "are controlling on the issues in the case". 60 F.C.C.2d at 35-36. After pointing out that, "prior to the present proceeding, there had been no confusion or debate over the meaning of private line services", 60 F.C.C.2d at 42, and detailing the reasons why Execunet is "indistinguishable from MTS," the FCC concluded:

> In essence, MCI is . . . asking us to reopen the *Specialized Common Carrier* decision to determine again what services should be open to com-

> petition. We decline to do so . . . . There is no allegation that the public interest considerations upon which the *Specialized Common Carrier* decision were based have changed at all, nor that the economic character of the communications industry has changed so drastically that we should re-examine the industry structure.

60 F.C.C.2d at 57.

The decision of the Court of Appeals for the District of Columbia reversed the FCC's *Execunet* decision and remanded the case to the FCC for further unspecified proceedings. The court did not question the FCC's determination that Execunet is "indistinguishable from MTS" nor did it question that the FCC had not, at any time, even considered, much less authorized, specialized common carriers to provide message telephone serivce. Indeed, the court conceded that "even if the Commission was without power to reject a tariff as that phrase is used as a term of art, it was empowered to reject the Execunet tariff in a practical sense". Slip op. at 19. Nevertheless, the court concluded that MCI was free to offer any service it desired, without restriction, whether private line or MTS, on the ground that the *Specialized Common Carrier* decision cannot reasonably be read to have made an affirmative determination that the public convenience and necessity required 'private line restrictions on the facilities authorizations of specialized common carriers' ". Slip op. at 30.

As the NARUC will show, the Court of Appeals decision can only be described as an abberation which cannot be permitted to stand. Indeed the court's radical departure from settled precedent of this Court and the Court of Appeals portends profound effects upon the entire structure of the telecommunications industry and dire consequences for the NARUC, for the State regulatory commissions of which

it is comprised and for the general public, all without justification in law or logic.

## REASONS FOR GRANTING THE WRIT

### THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND THE COURT OF APPEALS PERMITTING ADMINISTRATIVE AGENCIES TO UTILIZE RULEMAKING PROCEEDINGS TO ESTABLISH POLICIES FOR APPLICATION IN SUBSEQUENT PROCEEDINGS.

The basis for the Court of Appeals holding, setting aside the FCC's *Execunet* decision and permitting MCI to offer message telephone services as well as private line services, was that the FCC had failed to make findings of public convenience and necessity adequate to limit the authorizations of specialized common carriers to private line services. Slip op. at 30. Since such findings already had been made by the FCC in its *Specialized Common Carrier* decision, there appear to be only two possible explanations for the court's holding. First, the court apparently was of the view that, in reviewing the FCC's determination, it was limited to the four corners of the record made before the FCC in *Execunet* itself and therefore that it was not obligated to look beyond that proceeding itself to determine if the requisite findings had been made. Secondly, the court was also apparently of the view that the FCC could not, through a properly conducted rulemaking proceeding, establish a general rule concerning the scope of authorized competition and then apply that rule to tariffs offering services beyond the line previously established. Neither explanation will withstand analysis and each is flatly at odds with settled decisions of the Supreme Court and the Court of Appeals.

It has long been recognized that decisions of administrative agencies may not be overturned because a determination went beyond the record in the proceeding in question, unless there is actual prejudice to a party participating in the proceeding. This Court articulated this sound rule of administrative practice in *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 66 S.Ct. 687, 90 L.Ed. 821 (1946):

> [This Court] has not undertaken to make a fetish of sticking squarely within the four corners of the specific record in administrative proceedings or of pinning down such agencies, with reference to fact determinations even more rigidly than the courts in strictly judicial proceedings. On the contrary . . . the mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result.

327 U.S. at 530.

MCI can hardly claim and the Court of Appeals did not find that MCI was prejudiced in any way by what the Court erroneously perceived to be an absence of adequate public interest findings that the continued offering of Execunet exceeded MCI's limited authority to provide private line services. As the FCC itself pointed out, prior to *Execunet*, there had been "no confusion or debate" concerning whether the FCC had ever "modified" the policy it announced in its *Specialized Common Carrier* decision or whether the policy was still "controlling" or whether MCI's authority was limited to offering private line service. 60 F.C.C.2d at 35, 36, 42. Nor is the absence of confusion at all surprising, since MCI participated in each of the proceedings in which this question had been addressed by the FCC or the courts and had repeatedly represented its own understanding in those proceedings that its

authorization was so limited. By failing to take into account the extensive history leading up to the instant controversy reflected in the findings, conclusions and records of related proceedings, the court improperly elevated form over substance and made "a fetish of sticking squarely within the four corners of the specific record" of a kind this Court has squarely condemned. 327 U.S. at 530.

The Court of Appeals' total misapprehension of the nature and scope of the record before it on review of the FCC's decision led it similarly to misapprehend, contrary to a settled line of precedent, the function and purpose of rulemaking where an agency decision reflects the application of a rule after its promulgation. The landmark case establishing the proper scope of review of agency rulemaking, nowhere acknowledged by the Court of Appeals, is this Court's decision in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 76 S.Ct. 763, 100 L.Ed. 1081 (1956). In upholding the FCC's exercise of rulemaking authority to limit the number of stations a licensee could own, this Court announced a principle that the NARUC submits is fully applicable to this case:

> This Commission, like other agencies, deals with the public interest. *Scripps-Howard Radio* v. *Federal Communications Comm'n*, 316 U.S. 4, 14, 86 L.Ed. 1229, 1236, 62 S.Ct. 875. Its authority covers new and rapidly developing fields. Congress sought to create regulation for public protection with careful provision to assure fair opportunity for open competition in the use of broadcasting facilities. Accordingly, we cannot interpret § 309(b) as barring rules that declare a present intent to limit the number of stations consistent with a permissible "concentration of control." It is but a rule that announced the commission's attitude on public protection against

> such concentration. The Communications Act must be read as a whole and with appreciation of the responsibilities of the body charged with its fair and efficient operation. The growing complexity of our economy induced the Congress to place regulation of businesses like communication in specialized agencies with broad powers. Courts are slow to interfere with their conclusions when reconcilable with statutory directions.

351 U.S. at 203.

As this Court stressed in *Storer*, in terms flatly inconsistent with what the Court of Appeals required here, "we do not think Congress intended the Commission to waste time on applications that do not store a valid basis for a hearing." 351 U.S. at 205. The plain meaning of the Court's holding in *Storer* is that once the FCC adopts a valid rule, it need not relitigate the underlying rationale for and again make findings supporting the rule adopted. Instead, all that is required of the agency is to determine whether the particular situation before it falls within or outside of the previously established rule. The FCC's conclusions concerning Execunet fully satisfy that requirement — having been reached after exhaustive proceedings in which all interested parties had the opportunity to and did participate.

In *FPC* v. *Texaco, Inc.*, 377 U.S. 33, 84 S.Ct. 1105, 12 L.Ed.2d 112 (1964), this Court expanded upon the rule it announced in *Storer*. The question before the Court in *Texaco* was whether the FPC had properly adopted a rule requiring gas producers to file contracts as rate schedules, stipulating that only certain prescribed conditions in the contracts were permissible. and thereafter summarily rejecting applications that contained impermissible conditions. In upholding the FPC's action, this Court stated:

> The present regulations do not pass on the merits of any rate structure nor on the merits of a certificate of public convenience and necessity; they merely prescribe qualifications for applicants. Those qualifications are in the category of conditions that relate to the ability of applicants to serve the consumer interest in this regulated field.

377 U.S. at 42.

Having drawn a line by means of a rulemaking proceeding between the authorized and the unauthorized, as the FCC did in its *Specialized Common Carrier* decision and as the FPC did in *Texaco,* this Court made it crystal clear that unless the agency is free to apply that rule in the future, "the processes of regulation" would "be . . . prolonged and . . . crippled":

> To require the Commission to proceed only on a case-by-case basis would require it, so long as its policy outlawed indefinite price-changing provisions, to repeat in hearing after hearing its conclusions that condemn all of them. There would be a vast proliferation of hearings, for as a result of *Phillips Petroleum Co.,* v. *Wisconsin, 347 U.S. 672, 98 L.Ed. 1035, 74 S.Ct.* 794, there are thousands of individual producers seeking applications. See *Wisconsin v. Federal Power Comm'n,* 373 U.S. 294, 300, 10 L.Ed.2d 357, 362, 83 S.Ct. 1266. We see no reason why under this statutory scheme the process of regulation need be so prolonged and so crippled.

377 U.S. at 44.

Before its decision in the present case, the Court of Appeals for the District of Columbia Circuit had understood and applied this Court's teaching in *Storer* and *Texaco.* In *American Airlines, Inc.* v. *CAB, 359 F.2d 624 (D.C. Cir.),*

*cert. denied,* 385 U.S. 843, 87 S.Ct. 73, 17 L.Ed.2d 75 (1966), the court upheld the application of a policy statement previously adopted by the CAB to limit the kinds of carriers that could provide certain types of cargo service. The principal argument addressed by the court related to the meaning of the *Storer* doctrine. Petitioner there urged that "the doctrine is restricted to regulations affecting future applications for new licenses or certificates, whereas here the CAB affected rights under existing certificates". 359 F.2d at 628. The Court of Appeals flatly rejected "such a restrictive reading" of *Storer:*

> The present case is different in particular aspects of the facts or statutory provisions from *Storer* and the other *Storer* doctrine cases. However, the *Storer* doctrine is not to be revised or reshaped by reference to fortuitous circumstance. It rests on a fundamental awareness that rule making is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy in guiding the future development of industries subject to intensive administrative regulation in the public interest, and that such rule making is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making.

359 F.2d at 629.

Subsequently, in *American Telephone & Telegraph Co.* v. *FCC,* 539 F.2d 767 (D.C. Cir. 1976), the Court of Appeals applied precisely the same principle in approving the FCC's grant, without a hearing, of the application of United States Transmission Systems on the basis of the policy established in the *Specialized Common Carrier* decision:

> The Commission, of course, has "a large discretion to avoid time consuming hearings in this field whenever possible." *Southwestern Operating Co.* v. *FCC*, 122, U.S. App. D.C. 137, 128, 351, F.2d 834, 835 (1965); *Stone* v. *FCC*, 151, U.S. App. D.C. 145, 466 F.2d 316 (1972). Moreover, the *Commission may obviate the need for repetitious hearings on previously considered issues of public policy by establishing through rulemaking, criteria against which to judge specific applications. United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202-205, 76 S. Ct. 763, 100 L.Ed. 1081 (1956). Emphasis supplied.)

539 F.2d at 774.

In its decision below, the Court of Appeals totally disregarded the controlling decisions of this Court and its own prior decisions by the "importation of formalities" that have no proper place in the administrative process. By apparently requiring the FCC to redecide whether the line it drew in the *Specialized Common Carrier* decision remains consistent with the public interest — a needless task the FCC expressly declined to undertake in the context of Execunet, 60 F.C.C.2d at 57 — the court has made a mockery of the administrative process and turned the salutary purpose of a rulemaking proceeding on its head.

The practical effect of the court's erroneous decision is particularly disturbing. For one thing, it will result in further delay in an already drawn-out proceeding that can plainly serve no useful purpose.[21] Far more importantly,

[21] When and if MCI or some other specialized common carrier wishes to expand its authority, it can always return to the FCC and apply for a new or expanded certificate upon a showing that such expansion would serve the public interest. However, as the FCC pointed out in *Execunet*, "MCI has cited no changed circumstances which would require a re-examination of our policies regarding competition . . . as established in the *Specialized Common Carrier* decision". 60 F.C.C.2d at 57.

since other carriers previously limited by the FCC to the offering of private line services will in all probability seek to take advantage of the chaos introduced into the structure of the industry by the decision below, that decision jeopardizes the public interest in national rate averaging and the support message telephone revenues provide to local telephone service, unless it is stayed pending the action of this Court or further proceedings before the FCC.

The NARUC does not take issue with the abstract soundness of the court's discussion of the circumstances under which the FCC can reject a tariff and the requirements of the various provisions of the Communications Act which it addressed in that regard. Slip op. at 17-20. However, it is clear that the court erred in concluding that the FCC had engaged in an improper "departure from prior administrative practice", Slip. op. at 16, in rejecting MCI's tariff offering Execunet. Indeed, what the FCC did here was precisely the same as what it had done in an earlier case, *Press Wireless, Inc.*, 25 F.C.C. 446 (1958), *aff'd sub. nom. Press Wireless, Inc.* v. *FCC*, 264 F.2d 372 (D.C. Cir. 1959), which the court cited in its opinion. Slip op. at 17. In *Press Wireless*, the FCC had refused to accept a tariff offering a service which was beyond those specified in a rule limiting the services that could be offered over certain radio facilities. In a *per curiam* opinion, the Court of Appeals affirmed, finding no error in the FCC rejecting a tariff that "the Commission thought . . . covered services petitioner was not licensed to perform". 264 F.2d at 372. Because the FCC properly drew a line in its *Specialized Common Carrier* decision limiting MCI and other specialized carriers to offering private line service, the practice it followed in rejecting MCI's Execunet tariff offering message telephone service was both sound, lawful and essential to protect the public interest.

## CONCLUSION

For the foregoing reasons, the NARUC respectfully requests that this Court grant the Petition for Writ of Certiorari and summarily reverse the Court of Appeals decision.

PAUL RODGERS
*General Counsel*

CHARLES A. SCHNEIDER
*Assistant General Counsel*

WILLIAM R. NUSBAUM
*Deputy Assistant General Counsel*

National Association of Regulatory Utility Commissioners

1102 ICC Building
Post Office Box 684
Washington, D.C. 20044

(202) 628-7324

September 27, 1977

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-436

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., and N-TRIPLE-C, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE TENNESSEE PUBLIC SERVICE COMMISSION

EUGENE W. WARD
General Counsel

T. E. MIDYETT, JR.
Assistant General Counsel

TOM ELDRIDGE
Assistant General Counsel
Tennessee Public Service Commission

Cordell Hull Building
Nashville, Tennessee 37219
(615) 741-3191

October 12, 1977

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. .....

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., and N-TRIPLE-C, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE TENNESSEE PUBLIC SERVICE COMMISSION

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Comes now Bob Clement, Chairman, Z. D. Atkins, Commissioner, and Frank D. Cochran, Commissioner, duly-elected Tennessee Public Service Commissioners, and respectfully move the

Court for leave to file the attached Brief Amicus Curiae in Support of the Petition for Writ of Certiorari in the above-captioned cause.

In support of this Motion, the TPSC would show:

That the Tennessee Public Service Commission is an agency of the State of Tennessee created in its present form by the Act of the Tennessee General Assembly in 1897. That it is the agency in the State of Tennessee with authority to regulate, supervise and control all public utilities, pursuant to the Public Acts of 1919. That it sets the rates, services and charges of all public utilities in this State, including the granting of franchises, certificates, etc. That its duties are to see that the ratepayers of this State receive the best and highest service possible for their rate dollar. That it is a member of the National Association of Regulatory Utility Commissioners, a quasi-governmental non-profit organization founded in 1889. That the TPSC hereby moves the Court for leave to file Amicus Curiae Brief in Support of the Amicus Curiae Brief of the National Association of Regulatory Utility Commissioners.

This case is before this Court on a Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals had before it a petition for review, initiated by MCI Telecommunications Corporation, Microwave Communications, Inc., and N-Triple-C, Inc. (MCI), of a decision of the Federal Communications Commission (FCC) holding that MCI had exceeded its authorization, limited to the offering of private line services, by providing a a service called "Execunet", which the FCC found was not a private line service at all but instead was the equivalent of message telephone service (ordinary long distance service). *MCI Telecommunications Corp. Investigation Into the Lawfulness of Tariff FCC No. 1 Insofar as It Purports to Offer Execunet Service*, 60 F.C.C. 2d 25 (1976). The FCC's decision with respect

to Execunet was predicated upon its earlier decision, *Specialized Common Carrier Services*, 29 F.C.C. 2d 870 (1971), in which it had articulated the findings and evidence in support of its conclusion that the entry of MCI and other specialized common carriers, limited to the offering of private line services, was in the public interest. That decision was affirmed by the Court of Appeals for the Ninth Circuit in a decision which this Court elected not to review further. *Washington Utilities & Transp. Comm'n. v. FCC*, 513 F. 2d 1142 (9th Cir.), cert. denied, 423 U.S. 836 (1975). In disregard of those decisions and the FCC's continued rearticulation and reapplication of its now settled policy determination limiting MCI and other specialized common carriers to the provision of private line services, the Court of Appeals below held that MCI, and presumably all other specialized common carriers, are not limited to the offering of private line services and can offer ordinary long distance service and any other services they choose between and among the states throughout the country.

The Tennessee Public Service Commission, like the NARUC, has an historic and vital interest in the disposition of the Petition for Writ of Certiorari now pending before this Court. The decision of the Court of Appeals, by improperly setting aside the FCC's determination that MCI was not and is not authorized to provide Execunet service and, thereby, for the first time permitting competition for message telephone service in addition to private line service, will have a direct and potentially staggering effect both upon regulatory policies developed over decades to promote the availability of local telephone service at reasonable rates and upon the rates for those services themselves.

This Court's disposition of this case will have a direct impact upon the ability of State regulatory commissions to discharge their responsibilities on behalf of the citizens within their respective borders. Accordingly, the TPSC submits that its participation in these proceedings is essential to insure the full and

adequate representation of the interests of the State of Tennessee.

Wherefore, it is respectfully requested that this Court grant leave for the filing of a brief by the Tennessee Public Service Commission, as amicus curiae, in this case.

Dated this 10th day of October, 1977.

EUGENE W. WARD
General Counsel

T. E. MIDYETT, JR.
Assistant General Counsel

TOM ELDRIDGE
Assistant General Counsel
Tennessee Public Service Commission

Cordell Hull Building
Nashville, Tennessee 37219
(615) 741-3191

## BRIEF FOR THE TENNESSEE PUBLIC SERVICE COMMISSION AMICUS CURIAE

The Tennessee Public Service Commission submits, as provided by Rule 42 of the Rules of this Court, the following brief amicus curiae in support of the Petition for Writ of Certiorari filed by the Federal Communications Commission.

## OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, dated July 28, 1977, is not reported. The opinion of the Federal Communications Commission is reported at 60 F.C.C. 2d 25 (1976).

## QUESTION PRESENTED

This case presents questions vital to the Tennessee Public Service Commission and to the consumers throughout the State of Tennessee.

## INTEREST OF AMICUS CURIAE

The interests of the Tennessee Public Service Commission as amicus curiae are set forth in the attached motion for leave to file this brief.

## STATEMENT

The Tennessee Public Service Commission, being a member of the NARUC, does here and now adopt the statement heretofore filed by the NARUC amicus curiae on September 27, 1977.

## REASONS FOR GRANTING THE WRIT

**The Decision of the Court of Appeals Is in Conflict With the Decisions of This Court and the Court of Appeals Permitting Administrative Agencies to Utilize Rulemaking Proceedings to Establish Policies for Application in Subsequent Proceedings.**

The Tennessee Public Service Commission hereby adopts pages 18-25 of the NARUC's Amicus Curiae Brief filed on September 27, 1977.

## CONCLUSION

For the foregoing reasons, the Tennessee Public Service Commission respectfully requests that this Court grant the Petition for Writ of Certiorari and summarily reverse the Court of Appeals decision.

EUGENE W. WARD
General Counsel

T. E. MIDYETT, JR.
Assistant General Counsel

TOM ELDRIDGE
Assistant General Counsel
Tennessee Public Service Commission

Cordell Hull Building
Nashville, Tennessee 37219
(615) 741-3191

October 10, 1977

**Certificate of Service**

I certify that I have served a copy of this Motion and Brief on the following parties:

John E. Ingle
1919 M. Street, N.W.
Washington, DC 20554

John Shevefield
Acting Asst. Attorney General
Department of Justice
Washington, DC 20530

Michael H. Bader
Haley, Bader, Potts
1730 M. Street, NW
Washington, DC 20036

Michael Boudin
888 16th Street, NW
Washington, DC 20006

Thomas J. O'Reilley
Chadbourne Parke
Whiteside & Wolff
1150 17th Street, NW
Washington, DC 20036

Charles A. Schneider
Assistant General Counsel
1102 ICC Building
P. O. Box 684
Washington, DC 20044

Herbert E. Forrest
Steptoe & Johnson
1250 Connecticut Avenue NW
Washington, DC 20036

David Shipiro
Dickstein, Shipiro & Morin
Attorneys at Law
2101 L Street, NW
Washington, DC 20037

David A. Donohoe, Trustee
Akin, Gump, Haven, Feld
1155 15th Street, NW
Washington, DC 20005

Wade H. McCree
Department of Justice
Washington, DC 20530

Paul Rodgers
General Counsel
1102 ICC Building
P. O. Box 684
Washington, DC 20044

William R. Nusbaum
Deputy Assistant General Counsel
1102 ICC Building
P.O. Box 684
Washington, DC 20044

This 10th day of October, 1977.

.....

EUGENE W. WARD

MOTION FILED
OCT 19 1977

IN THE

# Supreme Court of the United States

OCTOBER TERM 1977

No. 77-436

FEDERAL COMMUNICATIONS COMMISSION,
*Petitioner,*

v.

MCI TELECOMMUNICATIONS CORPORATION,
MICROWAVE COMMUNICATIONS, INC., and
N-TRIPLE-C, INC.,
*Respondents.*

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE FOR THE STATE PUBLIC SERVICE COMMISSIONS OF THE DISTRICT OF COLUMBIA, VIRGINIA, AND WEST VIRGINIA

JOHN R. RISHER, JR.,
*Corporation Counsel, D. C.*

RICHARD W. BARTON,
*Deputy Corporation Counsel, D.C.*

JAMES T. MCMANUS,
*Assistant Corporation Counsel, D.C.*

*Attorneys for the Public Service Commission of the District of Columbia,*
*District Building,*
*Washington, D. C. 20004*

RICHARD D. ROGERS, JR.,
*General Counsel*
*Virginia State Corporation Commission*
*P. O. Box 1197*
*Richmond, Virginia 23209*

ARNOLD O. WEIFORD,
*General Counsel*

JOEL B. SHIFMAN,
*Assistant General Counsel*
*Public Service Commission of West Virginia*
*State Capitol Building*
*Charleston, West Virginia 25305*

IN THE

# Supreme Court of the United States

OCTOBER TERM 1977

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No. 77-436

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FEDERAL COMMUNICATIONS COMMISSION,
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MICROWAVE COMMUNICATIONS, INC., and
N-TRIPLE-C, INC.,
*Respondents.*

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## MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The state public service commissions of the District of Columbia, Virginia, and West Virginia, (Commissions) pursuant to Rule 42 of the Rules of this Court, respectfully move to file the attached Brief Amici Curiae in the captioned case. Petitoner has consented to the filing of this Brief. Respondents have not consented.

Under their respective organic statutes, the Commissions regulate, *inter alia,* the rates and charges for intrastate telephone service.[1] Consonant with their legislative mandate, the Commissions have pursued regulatory policies expressly designed to make basic local telephone service

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[1] D. C. Code, Art. 43, ch. 1-10 (1973); Code of Va., § 56-232 et seq.; W. Va. Code, § 24-2-1. 2, 3, 4 and 7 (1976 repl. vol.).

affordable by every resident. In recent years, a major factor which has enabled the Commissions to maintain the rates for basic residential telephone service substantially below cost has been the revenue support flowing from interstate telephone toll service (*i.e.*, "long distance" service) provided by established carriers. That revenue support will be significantly eroded if long distance services such as Execunet are provided by "specialized common carriers" such as MCI Telecommunications Corporation. The consequent diversion of interstate revenues to such specialized carriers will not reduce the established carriers' costs of providing "local" service, but will decrease significantly the revenue base defraying a portion of local service costs, thereby precipitating an increase in basic residential telephone rates.

The Commissions, by statute, are charged with the duty of ensuring their constituents the availability of adequate telephone service at reasonable rates. It is that interest which is directly at stake in this case.

Only after carefully analyzing the petitions for a writ of certiorari filed by the Federal Communications Commission and others [2] and the Brief Amicus Curiae filed by the National Association of Regulatory Utility Commissioners did the Commissions conclude that inadequate attention had been given to a compelling reason why this Court should grant the petitions for a writ of certiorari and reverse the Circuit Court of Appeals' decision. No petitioner or amicus curiae, to date, has focused on the fact that the Circuit Court of Appeals' decision will undermine *at the state level* furtherance of the Congressional mandate that regulation should promote "rapid, efficient, nationwide" telephone service "at reasonable charges." (47 U. S. C. § 151.) Contrary to the intent of Congress and

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[2] See *American Telephone and Telegraph Co.* v. *MCI Telecommunications Corporation, et al.*, Oct. Term, 1977, No. 77-421; *United States Independent Telephone Ass'n* v. *MCI Telecommunications Corporation, et al.*, Oct. Term, 1977, No. 77-420.

the public interest sought to be served by regulation, the unwitting proliferation of Execunet-type services will seriously erode state regulatory policies designed to foster universally affordable basic telephone service, the *sine qua non* of the interstate toll network. Thus, the questions presented by the petitions are of such far-reaching importance that they should be settled by this Court.

Accordingly, the Commissions request that this Court grant leave to file the attached Brief Amici Curiae.

Respectfully submitted.

JOHN R. RISHER, JR.,
*Corporation Counsel, D. C.*

RICHARD W. BARTON,
*Deputy Corporation Counsel, D.C.*

JAMES T. MCMANUS,
*Assistant Corporation Counsel, D.C.*

*Attorneys for the Public Service Commission of the District of Columbia,*
*District Building,*
*Washington, D. C. 20004*

RICHARD D. ROGERS, JR.,
*General Counsel*
*Virginia State Corporation Commission*
*P. O. Box 1197*
*Richmond, Virginia 23209*

ARNOLD O. WEIFORD,
*General Counsel*

JOEL B. SHIFMAN,
*Assistant General Counsel*
*Public Service Commission of West Virginia*
*State Capitol Building*
*Charleston, West Virginia 25305*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

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No. 77-436

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FEDERAL COMMUNICATIONS COMMISSION,
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*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## BRIEF AMICI CURIAE FOR THE STATE PUBLIC SERVICE COMMISSIONS OF THE DISTRICT OF COLUMBIA, VIRGINIA, AND WEST VIRGINIA

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The state public service commissions of the District of Columbia, Virginia, and West Virginia (Commissions) respectfully request that this Court issue a writ of certiorari in the captioned case and in the two companion fil-

ings,[1] each of which seeks review of the judgment entered by the Court of Appeals for the District of Columbia Circuit in *MCI Telecommunications Corporation* v. *Federal Communications Commission* (*Execunet* decision).

## INTEREST OF AMICI CURIAE

In the decision below, the Circuit Court of Appeals held that the Federal Communications Commission erred in finding that MCI's Execunet service (essentially ordinary long distance service) exceeded its certificate authority (which the FCC construed to limit MCI to providing only "private line" service). In reversing the FCC, the Court found lacking any affirmative determination justifying the claimed certificate restriction and concluded that "[o]nly if the Commission has determined that the public convenience and necessity may require that new services receive advance approval can it then reject a tariff as unauthorized." (Slip Opinion, p. 32.) The impact of this decision reaches far beyond the perimeter of the FCC's interstate sphere. Here lies the interest of the Commissions as amici curiae.

The resolution of the issues presented to this Court by the petitions ineluctably involve the interests of local telephone subscribers and state regulators of intrastate telephone services. Whether one calls it subsidy, value of service, or social engineering, the fact of the matter is that substantial benefits flowing out of the interstate operations of established carriers have been bestowed upon the user of local exchange service (basic service). Thus, a fundamental and pervasive public policy objective of making telephone service universally available has been achieved in large part because a significant amount of revenue from

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[1] *American Telephone and Telegraph Company* v. *MCI Telecommunications Corporation, et al,* October Term, 1977, No. 77-421; *United States Independent Telephone Association* v. *MCI Telecommunications Corporation, et al.,* October Term, 1977 No. 77-420.

the established carriers' interstate long distance telephone rates has been made available to defray local exchange costs. Such pricing policies evolved as part of a comprehensive regulatory scheme made workable only through the interaction of federal and state regulators.

The Commissions, on behalf of their constituency, the local telephone subscribers, possess a vital interest in the continuance of pricing policies aimed at maximizing the availability of basic service. To the extent that basic rates must be increased because potential interstate revenue contributions are lost to Execunet-type services, the Commissions' pursuit of affordable basic residential service will be thwarted. Accordingly, the Commissions possess a keen and direct interest in the outcome of the *Execunet* case.

## ARGUMENT

In reversing the Federal Communications Commission's *Execunet* decision, the District of Columbia Circuit Court of Appeals has set asunder the Congressionally mandated public interest objective of assuring that "all the people of the United States [have] . . . rapid, efficient, nationwide . . . communications service . . . at reasonable charges. . . . " (47 U. S. C. § 151), an objective which state regulators play an essential role in achieving. The questions presented by the petitions [2] are of such far-reaching importance that they should be settled by this Court.

If the lower court's conclusions prevail, a long-established, comprehensive regulatory scheme of telecommunications stands in jeopardy. With the paramount "purpose" of regulation directed toward the availability of universal

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[2] In this Brief Amici Curiae, the Commissions will not duplicate the arguments advanced by the Federal Communications Commission (FCC), the American Telephone and Telegraph Company (AT&T), and the United States Independent Telephone Association (USITA), in their respective petitions for a writ of certiorari and the arguments furthered bq the National Association of Regulatory Utility Commissioners (NARUC) in its brief Amicus Curiae.

service, regulation of interstate commerce under the Communications Act of 1934 has developed with a view of the telephone network as an economically and technically integrated whole. A regulatory purpose of such pervasive scope could, of course, not be achieved without the cooperative efforts of the States in ther regulation of local telephone service—universal telephone service could only be approached through the gateway of the local exchange.

The pre-eminence of basic telephone service in this comprehensive regulatory scheme is as much a cause as a product of the process. It must be remembered that public utility regulation grew out of not only economic concerns directed at "natural monopoly characteristics" but also social concerns. As the old English case law put it, utility companies are "affected with a public interest." Indeed, basic telephone service has become essential to the maintenance of life in our contemporary society. It is essential not only to the individual, but to the commonweal as an adjunct to public services such as police, fire and medical services.

"To ensure affordable basic service" thereby is an oft-repeated design running through the federal and state mosaic of telephone utility regulation. This policy objective is distinctly reflected in the process of allocating joint costs [3] between interstate and intrastate operations where "separations" procedures [4] have been developed to allocate more of the local exchange joint costs to the interstate jurisdiction. Because separations of jointly used resources are

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[3] The classic textbook example of this problem is how to allocate the costs of joint production of beef and hides. Here, the joint costs are incurred in providing several services from common facilities. For example, the same terminal equipment is used to provide interstate toll (long distance) and local exchange services.

[4] The current Separations Manual is a "Rule" prescribed by the FCC. 47 CFR 67.1 et seq.; *Separations Procedures*, 16 FCC 2d 317, 331 (1969); Prescription of Separations Procedures, 26 FCC 2d 247, 157 (1970). The FCC acitvely involved state regulators as vital partners in resolving these issues of mutual concern. See 26 FCC 2d at 248.

inherently arbitrary in economic theory, jurisdictional separations have become a flexible instrument of the industry and its regulators in furthering the overriding public policy objective of universal service.

To illustrate the benefits received by local exchange service under current separations formulae: In the District of Columbia, 37.3% of all local exchange plant costs for 1976 were allocated to interstate operations. On an actual use basis, however, interstate use accounts for only 11.48% of the total (interstate and intrastate) use of the local exchange facilities. Thus, in the separations process interstate use becomes "weighted" by a factor of 3.25,[5] thereby providing significant benefits to District of Columbia residential telephone subscribers. Conversely, the adverse impact of any diversion of interstate use from the established carrier to a specialized carrier is likewise weighted threefold. That is to say, for each percentage point reduction in the interstate use of the established carriers system, there will be a shift of 3.25% of local excange costs to intrastate operations to the detriment of the local user.

But the above only illustrates the direct and immediate impact of the *Execunet* decision. If competition in the interstate arena becomes entrenched such that the competitive market dictates the pricing of interstate service rather than the social policies recognized in the current allocations precedures, the separations formula itself becomes subject to adjustment, again to the detriment of the local subscribers. This because, in a competitive environment, the established intrastate-interstate carrier may no longer be able to share with its intrastate operations the benefits derived from interstate economies of scale.

Still another endangered regulatory policy designed to foster universal service is rate averaging. Here, the objective is to share the economies of scale realized over the

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[5] Under current separations procedures, weighting factors in excess of three are likewise realized by Virginia and West Virginia.

high traffic density routes with the high cost, low density routes so as to make the latter affordable. The adverse affect on that policy resulting from the injection of an overdose of competition into long distance toll service is manifest. As former District of Columbia Public Service Commissioner George A. Avery observed:

> Nationwide averaging of [Bell] system costs [is] used in order to bring telephone service within the economic means of the largest number of people possible; the Bell system calls this "value of service" pricing. Whatever the label for the situation, the fact remains that as competitive forces in the telecommunications industry siphon off the more lucrative, lower-cost, high usage urban business customer, the Bell system must seek recovery of those lost revenues by raising rates for other services, including telephone services to residential customers and to less densely populated areas. (Footnote omitted.) (Avery, "Social and Economic factors in Rate Design," 1975 Annual Report of the ABA Section on Public Utility Law 48, 68.)

Clearly, because of the comprehensive regulatory scheme of public policy running across the interstate and intrastate jurisdictions, an unavoidable result of the Court of Appeal's decision in the *Execunet* case will be to increase local basic rates to the detriment of the public interest. The Court of Appeals disclaims any assumption as to whether "competition like that posed by Execunet is in the Public interest." (Slip Opinion, p. 32.) However, the anomalous effect of the Court's decision is that the FCC, the very agency delegated the task of determining the public interest in the first instance, has unwittingly authorized Execunet-type services without any occasion to affirmatively and definitively consider the public interest implications of such applications for competitive long distance service. In short,

the Court below has turned on its head the "public interest" standard which this Court has held must be applied [6] and which Congress has mandated. This Court should not leave standing such a far-reaching departure from Congressional intent and such an aberration of governing legal standards.

## CONCLUSION

For the foregoing reasons and for the reasons set forth in the petitions for a writ of certiorari filed by the FCC, AT&T, and USITA, the Commissions respectfully request that this Court grant those petitions and upon due consideration, reverse the decision of the Court of Appeals.

Respectfully submitted.

JOHN R. RISHER, JR.,
*Corporation Counsel, D. C.*

RICHARD W. BARTON,
*Deputy Corporation Counsel, D.C.*

JAMES T. MCMANUS,
*Assistant Corporation Counsel, D.C.*

*Attorneys for the Public Service Commission of the District of Columbia,*
*District Building,*
*Washington, D. C. 20004*

RICHARD D. ROGERS, JR.,
*General Counsel*
*Virginia State Corporation Commission*
*P. O. Box 1197*
*Richmond, Virginia 23209*

ARNOLD O. WEIFORD,
*General Counsel*

JOEL B. SHIFMAN,
*Assistant General Counsel*
*Public Service Commission of West Virginia*
*State Capitol Building*
*Charleston, West Virginia 25305*

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[6] *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U. S. 86 (1953).

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-436

FEDERAL COMMUNICATIONS COMMISSION,

*Petitioner,*

*v.*

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., and N-TRIPLE-C, INC.,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF AMICUS CURIAE OF THE STATE OF NEW JERSEY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

WILLIAM F. HYLAND
Attorney General of New Jersey
*Attorney for Board of Public Utilities*
State House Annex
Trenton, New Jersey 08625

STEPHEN SKILLMAN
Assistant Attorney General
*Of Counsel*

CARLA VIVIAN BELLO
Deputy Attorney General
*On the Brief*

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF AMICUS CURIAE OF THE STATE OF NEW JERSEY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

New Jersey and its Board of Public Utilities submits, as provided by Rule 42 of the Rules of this Court, the following brief amicus curiae in support of the Petition for Writ of Certiorari filed by the Federal Communications Commission, (FCC).

## Interests of Amicus Curiae

The State of New Jersey and its Board of Public Utilities have a vital interest in the disposition of the petition for writ of certiorari now pending before this Court. The decision of the Court of Appeals, by setting aside the F.C.C.'s determination that specialized carriers are not authorized to provide ordinary long-distance telephone service, will have a direct and adverse affect upon New Jersey's regulatory policies and will endanger the continued availability of local telephone service at reasonable rates in the State of New Jersey.

Telecommunication service has been furnished in this country under a pervasive scheme of state and federal regulation on a non-competitive basis by AT&T, its operating telephone companies, and numerous other independent telephone companies operating in the individual states. Ordinary long-distance service has been provided since its initiation over the interstate switched network of AT&T, from originating and to destination points utilizing the facilities of the local telephone companies. Rate and revenue division policies have been developed and implemented under regulatory sanction with a view towards achieving the goal expressed by Congress in the Communications Act of 1934, namely, the availability of universal telephone service at affordable rates. 47 U.S.C. §151. The rate and revenue division policies developed and implemented by state and federal agencies have served to make long-distance service, even over little-used or "unprofitable" routes, generally affordable, and to permit the application of interstate long-distance revenues to defray the cost of rendering, and thus hold down the rates for, basic local exchange services, particularly basic residential service. Regulatory policies such as "rate averaging" and "jurisdictional separation" (fully described in the Motion

for Leave to File Brief Amicus Curiae submitted in this matter by the National Association of Regulatory Utility Commissioners), have become a basic premise of New Jersey's regulation of telephone rates and charges. The 7½ million citizens of New Jersey have for many years expected, and come to depend upon, the affordable, reliable telephone service made possible by the aforementioned rate-making policies.

The residential and business subscribers to telephone service in New Jersey generate an enormous volume of local and long-distance "MTS" (Message Toll Service) telephone traffic. In 1976, for example, well over 300 million interstate toll messages originated in New Jersey. Combined inter and intra state toll messages amounted in 1976 to about 1 billion. About 300 million calls (local and toll) per day were originated in New Jersey in 1976. These figures represent approximately double volume of such traffic generated only 10 years ago.

The greater increases in long-distance traffic have enabled state regulators to allocate a greater proportion of local plant costs to the interstate rate base of the regulated telephone companies and thus to maintain lower rates for essential local telephone service than would otherwise have been possible. Interstate toll revenues, contributing hundreds of millions of dollars annually to the operating telephone companies of New Jersey, have effectively supported lower local exchange service rates in New Jersey.

New Jersey and its Board of Public Utilities recognize the need to strike a balance between the advantages of regulated monopoly telecommunication service and the benefits to be obtained by competitive offerings. However, such balance must be struck by the federal and state agencies having primary jurisdiction in such matters. The

decision of the Court of Appeals permitting MCI, and other specialized common carriers, to offer ordinary long-distance telephone service, without the benefit of prior F.C.C. evaluation of the effect such offerings will have on existing carriers and traditional rate-making policies, will have a serious and adverse impact on the utility ratepayers of the State of New Jersey. The disposition of the Court of the now pending F.C.C. petition for certiorari will, therefore, significantly affect both the economic and social interest of New Jersey and its citizens. It will directly affect the ability of New Jersey, and its Board of Public Utilities, to meet their responsibility of insuring the continued availability to New Jerseyans of telephone service at affordable rates. The State of New Jersey and its Board of Public Utilities respectfully urge that this Court recognize the propriety of New Jersey's interest in this matter.

## ARGUMENT

The State of New Jersey and its Board of Public Utilities, the latter being a member of the National Association of Regulatory Utility Commissioners (NARUC), does here and now adopt the statement heretofore filed by NARUC Amicus Curiae on September 27, 1977.

The State of New Jersey and its Board of Public Utilities adopt the reasons for granting the writ set forth in the petition of the F.C.C. and the Amicus brief of NARUC. The State of New Jersey and its Board of Public Utilities believe that the opinion below, by misconstruing the purpose and provisions of the Communications Act of 1934 will, if permitted to stand, create chaos in State and Federal regulation of telecommunications services and undermine existing rate structure applicable to such services.

## CONCLUSION

**For the foregoing reasons, the State of New Jersey and its Board of Public Utilities respectfully request that this Court grant the petition for writ of certiorari and summarily reverse the decision of the Court of Appeals.**

Respectfully submitted,

WILLIAM F. HYLAND
Attorney General of New Jersey
By CARLA VIVIAN BELLO
Deputy Attorney General

Dated: October 21, 1977

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

## No. 77-436

FEDERAL COMMUNICATIONS COMMISSION,
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v.

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC. and N-TRIPLE-C INC.,
Respondents.

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR *AMICUS CURIAE* THE PUBLIC UTILITIES COMMISSION OF OHIO

WILLIAM J. BROWN
*Attorney General of Ohio*
MARVIN I. RESNIK
*Assistant Attorney General*
Chief, Public Utilities Section
JOHN W. RUDDUCK
*Assistant Attorney General*
Public Utilities Section
180 East Broad Street
Columbus, Ohio 43215
*Attorneys for Amicus Curiae*
The Public Utilities Commission of Ohio

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

## No. 77-436

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Respondents.

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR *AMICUS CURIAE* THE PUBLIC UTILITIES COMMISSION OF OHIO

## OPINIONS BELOW

Now comes the Public Utilities Commission of Ohio (hereinafter referred to as Commission) by its Counsel, William J. Brown, Attorney General of Ohio, and submits as provided by Rule 42(4) of the Rules of this Court, the following Brief *Amicus Curiae* in support of the Petition for Writ of Certiorari filed by the Federal Communications Commission. The opinion of the United States Court of Appeals for the District of Columbia Circuit, dated July 28, 1977, is not yet reported but is attached as Appendix A to the Petition

of the Federal Communications Commission (FCC). The decision of the FCC is reported at 60 F.C.C. 2d 25 and is attached to the FCC's Petition as Appendix B.

## THE INTEREST OF THE PUBLIC UTILITIES COMMISSION OF OHIO

The Commission is the agency statutorily vested with the jurisdiction to regulate and supervise, *inter alia*, the communications common carriers in Ohio. Included within the Commission's jurisdiction is the power and responsibility to regulate the level of telephone rates for local exchange and intrastate toll services. The Ohio Legislature has prescribed that the Commission carry out that regulation and supervision in such a manner as to insure that all Ohioans shall enjoy adequate telephone service at just and reasonable rates.[1]

The Commission is vitally concerned with this Court's disposition of the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit for the reason that the decision of the Circuit Court, if not reversed, may well have a potentially devastating effect on the ability of the Commission and other state regulatory commissions to carry out their statutory obligations. The Commission's Brief *Amicus Curiae* will address the regulators' problems and the effect that the decision of the Court below will have on users of telephone service in Ohio and throughout the nation.

## STATEMENT OF THE CASE

This case involves the creation of competition in the provision of Message Toll Service (MTS) without a determination by the FCC or the Court that competi-

[1] Section 4905.22, Revised Code of Ohio

tion is in the public interest. At the time of the decision of the Court below, MTS was furnished only by companies affiliated with the Bell System together with the independent telephone companies (those not affiliated with the Bell System) over an integrated nationwide network. The companies of the two segments of the telephone industry furnish their respective portions of the network on an interconnected basis and the industry has the obligation of serving every person, wherever located, who desires MTS service. Whether the monopoly status of MTS is *de jure* or *de facto* is not important to this discussion. MTS did until now occupy a monopoly status.

In 1969, the FCC began to experiment with competition limited to the provision of interstate private line service theretofore furnished only by the telephone industry as a common carrier offering.[2] As the experiment evolved, the FCC created a new category of common carriers, christened Specialized Common Carriers typified by Respondents (collectively referred to as MCI) and found a "general policy in favor of the entry of new carriers in the specialized communication field[3] . . .", and further that it was not necessary to hold hearings to restrict, ". . . new entry in any particular area to only one *private line* applicant".[4] *(emphasis added)*. The FCC and the several Courts of Appeals decisions, until now, have consistently considered Specialized Common Carriers to be restricted to the private line field. These newly created Specialized Common Carriers have no obligation to serve the public

[2] *Microwave Communications, Inc.*, 18 F.C.C. 2d 953, recon. denied, 21 F.C.C. 2d 190 (1970)

[3] 29 F.C.C. 2d at 920

[4] 29 F.C.C. 2d at 926

other than in the routes selected by them. Although the effects of serving these select customers in a relatively small segment of the communications market have not yet been fully realized, suddenly the experiment is enlarged to encompass the entire market.

Competition is not new in the history of the telephone industry. Early in this century, telephone companies vigorously competed for territory and customers. Companies duplicated the facilities of each other in serving the same territory and oftentimes refused to interconnect their respective lines to provide the service required by the public. The chaos created by competition led to pervasive regulation of the telephone industry in the furtherance of the public interest. To cope with the chaotic situation, the states enacted legislation intended to eliminate competition for customers and territory [5] and to require telephone companies to interconnect their facilities and form continuous lines.[6] At a later date, Congress, in enacting the Communications Act of 1934, gave the FCC the power to require the companies,

> ". . . to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the division of such charges, . . ." Section 201(a).

Thus, the integrated nationwide network, is at least in part, the result of Federal and state legislative action. It is this legislatively mandated network that the decision of the Court below might damage to the ordinary telephone user's detriment.

The decision of the Court of Appeals in this case held that the FCC erred in ordering MCI to cease and

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[5] e.g. Section 4905.24, Revised Code of Ohio

[6] e.g. Section 4905.50, Revised Code of Ohio

desist offering a service called "Execunet".[7] The FCC's order was based on a finding that Execunet was not a private line service but instead a service that was essentially the same as MTS offered by the telephone industry over the industry's integrated network and as such was not within the limited authorization previously granted MCI.

The Court of Appeals, in reversing the FCC's order, held that MCI was authorized to provide Execunet and any other service which would be adequately provided over its facilities, that MCI's authority was not limited in any way despite the fact that the FCC had not made a determination that such unlimited authority would be in the public interest and that it could not be limited unless and until the FCC appropriately found that such unlimited authority was contrary to the public interest.

## REASONS FOR GRANTING THE WRIT

### A. Conflict with other decisions.

The Commission fully supports the very careful analysis presented by the FCC in its Brief with respect to the irreconcilable conflict between the Execunet decision and decisions of this Court and Court of Appeals involving new entry into the communications market. The analysis and argument involving such conflicts will not be duplicated in the Commission's Brief *Amicus Curiae*.

### B. Importance of this case to the user of telephone service in Ohio and throughout the nation.

The Commission, other state regulatory commissions and the FCC have slowly and painstakingly molded the

[7] Execunet, MTS and private line service referred to throughout this Brief *Amicus Curiae* are fully described in the briefs of the parties.

telephone industry's rate structure to serve the public interest. If that structure is to be changed, it should be done only if and when the evidence supports the conclusion that the change would serve that interest. The Court of Appeals declined to consider that question specifically saying that it had not had to consider whether competition in the MTS field was in the public interest. The decision creates competition not because it is in the public interest but solely because the Court determined that the FCC could have limited MCI's authority to the provision of private line service under Section 214 of the Communications Act but failed to do so in a manner considered appropriate by the Court.

Despite the Court's finding that there had not been a public interest determination by the FCC and despite the Court's refusal to consider whether the public interest would be served by this new competition, the effect of the Court's decision is to mandate competition in the MTS field. The decision establishes the principle, not heretofore enunciated, that competition throughout the communications market is permissible until and unless it is found to be against the public interest. The establishment of this principle is in direct contradiction of this Court's finding that, "The Act [Federal Communications Act of 1934] by its terms *prohibits* competition by those whose entry does not satisfy the 'public interest' standard".[8] *(emphasis added)*. The effect of the Execunet decision would be to rewrite that finding to say, "The Act by its terms *permits* competition *until* those who have entered are found not to satisfy the 'public interest' standard." Such a startling disregard of this Court's finding should not be allowed

[8] *F.C.C. v. RCA Communications, Inc.*, 346 U.S. 86 at p. 96 (1953)

to prevail. This concept, flying as it does in the face of considered regulatory representation in a sensitive area of Federal-state relations, comes as a complete surprise to the Commission and can have a most serious impact on the Commission's ability to carry out its statutory obligations.

The Commission is not here concerned with the effect on the private financial interests of MCI, the Bell System or the independent telephone companies. Instead, it is concerned because the decision may adversely affect basic service rates which the Commission has, until now, been able to maintain at relatively low levels. It is the impact that the lower Court's decision might have on the rates for residential and small business users in Ohio and nationwide that has motivated the Commission to file this Brief *Amicus Curiae*. This group is served by Bell System and independent telephone companies.

Most telephone plant is used in common for interstate and intrastate services. Toll service revenues (which include MTS—the type of service furnished by MCI's Execunet) are made available for the support of intrastate investment through an allocation process cooperatively developed by the FCC and the state regulatory commissions.[9] This process separates the investment, expenses and revenues between the state and Federal jurisdictions and is based on the relationship

[9] See *In the Matter of Prescription of Procedures for Separating and Allocating Plant Investment, Operating Expenses, Taxes and Reserves Between the Intrastate and the Interstate Operations of Telephone Companies*. 26 F.C.C. 2d 247, 248 (1970). See also *Washington Utilities & Transportation Com'n v. FCC*, 513 F. 2d 1142 (1975) for a description of the separations process.

of interstate and intrastate use. Since a service like Execunet will by-pass the integrated networks' interstate circuits while using the telephone industry's intrastate facilities to both originate and terminate calls, it will not only diminish the interstate portion but at the same time, by creating intrastate use where it did not previously exist, will increase the intrastate portion. This will seriously distort the separations process and result in a substantially smaller flow of interstate MTS revenues to support intrastate facilities, thus creating upward pressure on basic service rates.

The telephone industry's toll service revenues and the separations process are most important to the state regulators in their efforts to keep basic service rates low. The annual reports of telephone companies required to be filed with the Commission show that the toll service revenues of Ohio's Bell System companies (Ohio Bell and Cincinnati Bell) comprise approximately 38% of the total revenues of those companies and that the toll service revenues of the independent telephone companies represent an even higher percentage. For example, one of the larger independent telephone companies in Ohio derives approximately fifty percent of its total revenues from such service. Even more substantial can be the effect on the customers of smaller independent companies. These companies often derive a larger portion of their total revenues from toll service, e.g., over 60% of the total revenues of one small Ohio independent telephone company comes from toll service. Any diminution of this revenue will create additional pressure for basic service rate increases.

The Specialized Common Carriers, such as MCI, have no obligation to serve the public other than in the

routes selected by them and any advantage to the large business user of such service is at the expense of the residential and small business user of telephone industry services.

Under the existing telephone industry MTS rate structure developed over the decades of regulation, one rate applies for calls between equidistant points within a state and one rate applies for calls of equidistance between states. These rates reflect average costs, i.e., do not reflect the substantially different costs applicable to each route. Since the routes selected by the Specialized Common Carriers duplicate the most profitable routes in the nationwide integrated telephone industry network, we can reasonably expect the telephone industry's response to such competition to be a departure from cost and rate averaging. Walter Hinchman, Chief of the FCC's Common Carrier Bureau, describes this response as follows:

> "Message Telephone Service involves a great deal of Nationwide averaging of rates. If we start having competition in that part of the business, the deaveraging of basic message telephone service will have to take place." [10]

Attempts to implement such deaveraging have already begun in the interstate private line field.

If rates must be determined in relation to the cost of service in the various routes, the Commission and other state regulatory commissions are suddenly faced with the very serious requirement of reorienting the

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[10] Testimony of Walter Hinchman, Chief of the Common Carrier Bureau, Oversight Hearing on Domestic Common Carrier Regulations, Subcommittee on Communications, House Committee on Interstate and Foreign Commerce. Tr. Vol. IV, p. 46 (November 10-21, 1975).

approach to state ratemaking. It is submitted that, as a consequence, the nation's policy of affordable telephone service for all will be seriously undermined. This comes about, not from an affirmative public interest determination — the circumstances are persuasive that the change is likely to be contrary to the public interest — but from the Court of Appeal's narrow construction of Section 214 of the Communications Act which frustrates the FCC's considered intention to authorize Specialized Common Carrier entry only in the private line field.

## CONCLUSION

The disposition of this case will have a serious and long-lasting effect upon the ability of the Commission and other state regulatory commissions to carry out their obligations on behalf of the ordinary telephone users in their respective states. For this reason, the Commission respectively requests that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

WILLIAM J. BROWN,
*Attorney General of Ohio*

MARVIN I. RESNIK,
*Assistant Attorney General*
Chief, Public Utilities Section

JOHN W. RUDDUCK,
*Assistant Attorney General*
Public Utilities Section
180 East Broad Street
Columbus, Ohio 43215
(614) 466-4395

## APPENDIX

4905.22 (614-12) (614-13). Service and facilities required; unreasonable charge prohibited.

Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded, or in connection with, any service, or in excess of that allowed by law or by the order of the commission.

4905.24 (614-52). Company not permitted to exercise right of franchise where another is giving adequate service.

No telephone company shall exercise any permit, right, license, or franchise that was granted prior to June 30, 1911, but was not actually exercised, or granted after such date, to own or operate a plant for the furnishing of any telephone service, in any municipal corporation or locality where there is in operation a telephone company furnishing adequate service, unless such telephone company first secures from the public utilities commission a certificate, after public hearing of all parties interested, that the exercising of such license, permit, right, or franchise is proper and necessary for the public convenience.

4905.50 (614-63). Power to form continuous line.

The public utilities commission may, upon complaint in writing by any person or on its own initiative, by

order, require any two or more telephone companies whose lines or wires form a continuous line of communication, or could be made to form such a continuous line of communication by the construction and maintenance of suitable connections or the joint use of equipment, or by the transfer of messages at common points, between different localities which cannot be communicated with or reached by the lines of either company alone, where such service is not already established or provided for, unless public necessity requires additional service, to establish and maintain through lines within this state between two or more such localities.

The joint rate or charges for such service shall be just and reasonable. The commission may establish such joint rate or charge, and declare the portion of it to which each company affected is entitled and the manner in which it shall be secured and paid. All necessary construction, maintenance, and equipment to establish such service shall be constructed and maintained in such a manner and under such rules, with such division of expense and labor, as is required by the commission.